United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

Executed
Original

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IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

NO. 74-2684

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT FISHER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

VOLUME 2 of 2

APPENDIX TO BRIEF OF APPELLANT

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Attorney for Appellant

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PAGINATION AS IN ORIGINAL COPY

A Yes. This is a receipt or a copy of a receipt signed by Ann Holub, who was my secretary. It is dated March 17, 1967, and this memorializes the receipt of the $1650.

MR. FEINBERG: The Government offers 78 and 78A.

MR. NAFTALIS: No objection.

xx (Government's Exhibits 78 and 78A received in evidence.)

Q Mr. Nussman, at this time, did you have any further conversations with Mr.Fisher concerning the balance due?

A Well, I explained to him that what I had to do was to make a title search to see that the title to the property was good and after I had ascertained that, I would be in touch with him and advise him that I would need the balance in order to send it over to the attorney representing the sellers so that I could get the deed to the property.

Q What did he say?

A He understood and he agreed that would happen.

Q Did you have occasion to see Gilbert Fisher again after that?

A Yes, I did.

Q When?

A I don't know the exact date, but after I had made my search, I had gotten in touch, I think, with him, and told him that the title was good and that I would need the

balance in order to send it over to the attorney who represented the sellers.

Q Did there come a time when you met with Mr. Fisher inyour office?

A Yes, I did.

Q Was anybody else present?

A When he first came in? No.

Q What happened?

A Well, he came in and in response to my communication to him, and he gave me the balance of the money.

Q How did he give you the balance of the money?

A Well, as I recall, it was in a slightly torn brown paper bag and I asked him what it was, and he said that was the balance, and I could see that it was a large number of bills, some of them were smaller denominations, 10 or 20. It was then late in the afternoon, as I recall it, and I wasn't going to take the time to count it.

I called in my secretary, Miss Holub, and I told her to go downstairs to the bank with Mr. Fisher, let the teller count the money, and make a deposit of that money in my trust account, and that was done.

Q They left?

A They left.

Q I show you Government Exhibit 80 and ask if you can

identify this.

A Yes, this is the slip that shows that the amount on that day received was $16,650 in cash and it represented the balance of thepurchase price.

It was put in the trustee account of Back & Nussman and the initials on the bottom are AMH, who at that time was my secretary, Miss Holub.

MR. FEINBERG: The Government offers 80 into evidence.

MR. NAFTALIS: No objection.

xx (Government's Exhibit 80 received in evidence.)

(Mr. Feinberg read from Government Exhibit 80 in evidence to the jury.)

Q Mr.Nussman, when you received this money from Mr. Fisher, was Lulu Fisher present at all during that entire meeting in your office?

A My recollection is she was not.

Q Was Gilbert Fisher, Sr. present at all during that meeting?

A Not to my recollection.

Q Was Rosalie Fisher present?

A I had never met Rosalie Fisher.

Q Following the deposit of this money, what happened after that concerning this transaction?

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A Well, as I recall, I drew a trust account check for the balance due the sellers and sent that over with a letter to Mr. Seymour Smith, who represented the sellers, and asked him to send me a proper deed.

Q I will show you Government Exhibit 81 and ask if you can identify that.

A Yes, this is a check drawn out of the Back & Nussman trust account, dated April 7, 1967, made payable to Isaac Sherman Tamara Sherman, who were the sellers, under the contract, for the balance due, which was $14,850.

Q You sent that check out?

A I sent that to Mr. Smith, yes.

MR. FEINBERG: The Government offers 81.

MR.NAFTALIS: No objection.

xx (Government Exhibit 81 received in evidence.)

Q Mr. Nussman, did you have occasion to see Gilbert Fisher, Jr. again after that date, after March 31?

A Yes, I did.

Q When, do you recall?

A I don't recallthe exact date.

Q Where did you meet him the next time?

A At my office.

Q Was anybody else present?

A A Mr. Mentes.

Q M-e-n-t-e-s?

A That is correct.

Q Do you know from your own personal knowledge who Mr. Mentes is?

A Well, I had never met him before. He apparently was a building contractor and there had been arrangements made, not in my office, concerning the building of a house apparently on this lot that had been purchased and the contract was shown to me.

P.M.

-6-1

Q Who was present at this meeting?

A My recollection is that Mr. Mentes, Mr. Fisher, and I can't recall if anyone else was present at the time. There may well have been someone else.

Q What happened at this meeting?

A We went over the terms of the contract, and I indicated my dissatisfaction with it because I felt it did not protect the persons who were building the house, the Fishers.

Q Did you do anything at that time?

A Either at that time or a few days later. I re-drafted the contract.

Q I show you Government Exhibit 88. I ask you if you can identify that.

A Yes. This was the revised contract which I drew.

Q How do you know that? Is that your Back?

A This is my Back, Back & Nussman, Hackensack, New Jersey.

Q What is the date of that?

A April 13, 1967.

MR. FEINBERG: The Government offers Exhibit 88 in evidence.

MR. NAFTALIS: No objection.

XXX

(Government Exhibit 88 received in evidence.)

Q Do you recall, Mr. Nussman, what the amount was that was stated in the contract for the construction of the house?

A I think around $45,000.

MR. NAFTALIS: I object. The document speaks for itself.

MR. FEINBERG: Ladies and gentlemen of the jury, page 2 of this document states that the sum for the construction of the house shall be $45,000 made up of -- and following is a breakdown (indicating).

Q After this, Mr. Nussman, did you have any occasion to do any other work for Mr. Fisher?

MR. NAFTALIS: Objection to the form of the question. He was doing work for Mr. Fisher, Sr. and --

THE COURT: Reframe the question.

Q Did you have another occasion to meet with Gilbert Fisher?

A I may have. I don't recall distinctly.

Q I show you Government Exhibit 83 and ask you if you can identify that?

A Yes. This is the letter that I wrote to the construction company on July 28, 1967 concerning the progress of the job.

Q Would you look at the other documents as well.

A There is a letter dated October 6, 1967, also written to Mentes Construction Company, in which I apparently sent a check for $4,000 drawn to the order of that company, and it also speaks about the job not proceeding in accordance with the agreement.

6-2 Q I think there is one more there.

A There is a letter dated October 18, 1967 addressed to the same company signed by me and, again, I make reference to the manner in which the job is progressing, and I say something in here about the certificate of occupancy, apparently

Q Prior to writing these letters, Mr. Nussman, did you have any conversations with Mr. Fisher?

A Oh, yes.

Q What were those conversations?

A Well, the conversations were relative to the fact that the job was progressing in accordance with the terms of the agreement and also, as I recall, something about extras that Mr. Mentes was claiming.

Q Extras in the construction of the house?

A Right.

As I recall in my conversation with Mr. Fisher, I asked, "Were those extras agreed to in writing as I had provided for in the contract?" And I think he indicated to me, my best recollection is, that they had not followed the

formalities as I set them forth.

Q Mr. Nussman, did you ever speak to Gilbert Fisher Sr. or Lulu Fisher concerning the writing of these letters?

A I don't recall.

Q But you do recall speaking to --

MR. NAFTALIS: Objection. That has been asked and answered as to whom he spoke to.

Q Mr. Nussman, did you ever meet with Gilbert Fisher Sr. or Lulu Fisher?

A Yes, I did.

Q When?

A I don't recall the exact date, but I met with them at least on two occasions. They were in my office on at least one occasion, and I met with them a second time at the premises at 446 North Woodland Street sometime later. I don't know how much later. Maybe a year or so, maybe less.

Q What were the circumstances of that second meeting on the premises at Woodland Street?

A I had prepared a deed for the transfer of title for Mr. and Mrs. Fisher Sr. to two children.

Q Prior to preparing the transfer of title, did you have a conversation with Mr. Fisher Jr.?

A My recollection is that I did.

Q What was the conversation?

A I think -- My recollection is that he either called me on the telephone or might have been in the office and said that he would like that property -- not that he would like, that there was an indication that -- I don't know whether it came from him or came from hismother and father --that the property, that the title of the property, be transferred to two children.

Q What did you say?

A Well, I inquired of the ages of the children and found out that they were very young, and I said that that was a very, very bad thing to do, and I suggested that it be transferred to someone in trust for the children until they became of age.

Q What did Mr. Fisher say?

A He acceded to that and indicated to me that he would be the trustee.

Q I show you Government Exhibit 84 and ask you if you can identify it?

A Yes. This is the deed that I prepared in accordance with my conversation as I have just related it.

MR. FEINBERG: The Government offers Exhibits 83 and 84 in evidence.

(Pause.)

MR. NAFTALIS: I have no objection to Exhibit 84.

XXX

(Government Exhibit 84 received in evidence.)

MR. NAFTALIS: I have no objection to Government Exhibit 83.

XXX

(Government Exhibit 83 received in evidence.)

Q On or about August 29 of 1969, did you go to the house in Englewood, with that document, Exhibit 84?

A Yes, I did.

Q Who was present when you arrived at the house?

A Well, Mr. Fisher, Sr., Mrs. Fisher -- that is Lulu Fisher -- and I think a lady by the name of Bernice, a maid, as I recall -- I assumed she was a maid -- and there were two youngsters that I saw just in passing.

Q What happened when you arrived at the house?

A Well, we went into the sitting room or living room, and I went over the deed very, very carefully with Mr. and Mrs. Fisher, Sr. I read them the trust provisions in toto and I explained it to them and asked them if they understood it and told them why it was being done this way and asked them if they understood it and asked them if there were any questions about it. They indicated they were satisfied with it, and they then both signed it in my presence. I witnessed their signatures and took the proper acknowledgment so that it could be recorded in the proper office.

Q How would you describe Mr. Fisher, Sr. and Lulu

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Fisher?

A They were quite elderly. They were of small stature, as I recall. They appeared to comprehend what I was discussing with them.

Q Mr. Nussman, did you ever receive any fee from Mr. Fisher, Sr. or Lulu Fisher?

A No.

Q Did you ever receive any fee from anybody in regard to thismatter?

A Yes, from Gilbert Fisher, Jr.

Q I show you Government Exhibit 85 and I ask you if you can identify that?

A Yes. This is a slip apparently in the handwriting of my secretary dated January 11, 1968, which indicates that we did receive $1,000 in cash, from, it says here, "Client."

Q You recall receiving this $1,000?

A Yes.

Q From whom?

A Mr. Fisher, Jr.

MR. FEINBERG: The government offers Exhibit 85.

MR. NAFTALIS: May I see the other documents too, please.

(Pause.)

MR. NAFTALIS: I have no objection.

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(Government Exhibit 85 received in evidence.)

Q Mr. Nussman, do you know anybody by the name of John Singleton?

A No, I do not.

Q Do you know anybody by the name of Rosalie Fisher?

A I dont know her. I have heard the name.

Q Did you ever meet her?

A I have seen her, yes.

Q Did you ever meet her during this period 1967-1968?

A No.

Q You have seen her in this courthouse?

A Yes. This year.

MR. FEINBERG: I have no further questions.

THE COURT: Cross-examination.

MR. NAFTALIS: May I approach the bench for a moment?

THE COURT: Yes.

(At the side bar.)

MR. NAFTALIS: Although Mr. Feinberg has been courteous in supplying me with the 3500 material in advance of trial, I frankly have not looked at the 3500 material on this witness. I spent the entire lunch hour preparing for Mr. Singleton's cross-examination. I have never examined any

of these documents.

May I have a few minutes to examine the 3500 material and examine these documents before I start the cross-examination of this witness. I do not think that the cross-examination will be very extensive. I would like to look at them.

THE COURT: How much time do you want?

MR. NAFTALIS: Five or ten minutes, your Honor.

THE COURT: I will excuse the jury for five or ten minutes.

(In open court.)

THE COURT: We will take a short recess, members of the jury.

(Recess.)

(In open court, jury present.)

MR. NAFTALIS: May I inquire, your Honor?

CROSS-EXAMINATION

BY MR. NAFTALIS:

Q Mr. Nussman, you have indicated you are an attorney in New Jersey, is that correct?

A Yes, sir.

Q You have been a member of the bar for a good number of years?

A Yes, sir.

Q I take it that you have indicated that there came a time in 1967 when you performed some legal services for Gilbert Fisher, Sr. and his wife Lulu Fisher, is that correct?

A Yes, sir.

Q They were your clients, is that correct?

A Yes, sir.

MR. FEINBERG: I will object to the question.

THE COURT: You may take it up on redirect.

Q They were your clients--

A Perhaps I should rephrase the answer and say I assume they were my clients.

Q As a matter of fact, you indicated that fact on your records?

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A That is correct.

Q I show you Exhibit 78 in evidence and you list Lulu Fisher as the client?

A That is correct.

Q Also on Exhibit 80?

A That is correct.

Q I take it it is fair enough to say in your experience as an attorney for a good number of years, it is not a very unusual or significant transaction for somebody to buy a house?

A Not at all.

Q I guess it happens fairly often?

A It does.

Q I take it over the years you have handled many purchases and sales of houses and real estate in the Garden State?

A I did and still do.

Q I think you have indicated that you met Mr. and Mrs. Fisher, Sr., the purchasers of the house, on two or three occasions or so?

A Yes, two or three. I don't recall. I can recall specifically two. There may have been a third.

Q I think you indicated that they were elderly at the time?

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A Yes, sir.

Q But to your recollection they were mentally alert and seemed to comprehend everything that was discussed when you discussed the ramifications of the transactions with them?

A That is correct, that was my impression.

Q I take it on a couple of occasions you had conversations with this gentleman here, Gilbert Fisher, Jr.?

A Yes, I did.

Q In connection with the house that his parents were buying?

A That is correct.

Q I take it there is nothing unusual about a son of a client of yours coming in and chatting with you about a matter that affects them, is it?

A I wouldn't consider it unusual, no.

Q It certainly wasn't the first and last time it has happened in your experience?

A That is correct.

Q Now, there came a time when it came to your attention, did it not, that there were certain problems in connection with the building of a house on the land?

A Yes, sir.

Q And this gentleman, Mr. Mentes, the contractor,

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was trying to add extras onto the price, wasn't he, or something like that?

A Well, I don't know what occurred between the Fishers and Mr. Mentes.

It was called to my attention that he was asking for some money which apparently were for extras. What those conversations or transactions were, I was not privy to.

Q In anyevent, you felt that it was in the interests of Mr. and Mrs. Fisher, Sr., Gilbert and Lulu Fisher, to redraft the agreement that they had with Mr. Ments for construction of the house?

A Yes, sir.

Q I show you what is in evidence as Government Exhibit 88 and I think you have identified this as the agreement you drafted between Gilbert Fisher, Sr. and his wife Lulu Fisher, and the Ments Construction Corporation?

A That is correct.

Q Turning to the last page, they signed, did they not, Gilbert Fisher, Sr. and Lulu Fisher?

A Not in my presence. This document was not executed in my presence.

Q It was executed somewhere out ofyour office?

A It was, apparently.

THE COURT: You had not met them at that time, had

you?

THE WITNESS: I had met them, I think, prior to that, yes.

THE COURT: Where?

THE WITNESS: In my office.

Q Subsequent to your drafting this agreement with Mr. Mentes and your clients, the Fishers, there continued to be certain problems, did there not, with the work that Mr.Menteswas doing in building the house? Is that correct?

A Yes, sir.

Q In connection with your legal representation of Gilbert Fisher, Sr. and Lulu Fisher, his wife, you wrote a series of letters as t'eir attorney to Mr. Mentes complaining, demanding performance.

I don't know what is the right way to describe it, but I think you know what I mean.

A That is correct. I wrote a series of three letters, yes.

Q The first one of these letters indicates, does it not, that a carbon copy of it went to Gilbert Fisher, Sr., is that correct?

A That is correct.

Q Not to Gilbert Fisher, Jr., just Gilbert Fisher, Sr.,

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is that correct?

A That is correct.

MR. NAFTALIS: Mark this as our next exhibit.

(Defendant's Exhibit H marked for identification.)

Q I show you Exhibit H for identification.

Is that a letter that you sent to Gilbert Fisher, Sr., your client, that is Mr. Fisher's father here, in connection with the Mentes problems?

A Yes.

Q As a matter of fact, with that letter H for identification, you enclosed the letters found in Exhibit 83.

A I enclosed one letter. I enclosed the letter of July 28, 1967.

Q The top one?

A That is correct. My carbon copy indicates that a copy did go to Gilbert Fisher, Sr. and it was enclosed with this letter, the original of which I have in my hand.

MR. NAFTALIS: Thank you.

May I offer this in evidence, Mr. Feinberg?

MR. FEINBERG: No objection.

(Defendant's Exhibit H received in evidence.)

Q Now, the first letter that you sent, which is part of Exhibit 83, complaining about the quality and

performance of Mr. Mentes' work is dated July 28, 1967?

A Yes.

Q Then you wrote a second one to him, dated October 6,1967?

A Yes, sir.

Q And then a final one, dated October 18, 1967, is that correct?

A Yes, sir.

Q Now, in your letter of October 18, 1967 to Mr. Mentes, you point out that you have spoken to Mrs. Lulu Fisher on the telephone who has brought certain complaints to your attention about his work.

A Well, the letter says Mrs. Fisher.

Q Is that the only Mrs. Fisher that you were acquainted with in connection with this matter, Lulu Fisher?

A It is the only lady I had met.

Q You had not spoken to Rosalie Fisher about it, had you?

A No.

Q Now, these transactions about the purchase of the house, the agreement you drafted and the problems with the way Mr. Mentes was carrying out his duties to build the house, these all occurred, I think, in 1967, is that correct?

A It appears that way from the letters, yes, sir.

Q Two years later, two years into the future, two years after this, 1969, you indicated in your direct testimony that you were informed that your clients, Mr. and Mrs. Fisher, Sr., Gilbert and Lulu Fisher,were interested in transferring this house to their grandchildren.

A That's correct.

Q I take it that you had not found anything unusual in your practice of law about grandparents wanting to do something for the grandchildren, have you?

A Not at all.

Q You learned at that time that these were youngsters?

A Yes, I did.

Q And as a result, as an attorney, in connection with your responsibilities, you advised that it would not be advisable to transfer title to the house to minors?

A That's correct.

Q You suggested that someone act as the trustee and hold the house in trust for the children?

A That's correct.

Q Which means that when they reach maturity the house becomes theirs because they are really the owners?

A Yes. I think I provided when the youngest became 21 years of age.

Q Mr. and Mrs. Fisher at the time, 1969, when the

transaction was being discussed, were very elderly, were they not?

A Yes.

Q He was in his late 80's?

A I didn't know his age, but from my personal observation they were elderly.

Q There was still a good bit of time until one of the youngsters became 21?

A My recollection is that they were 10 or younger.

Q So as a result it was determined that the trustee, the person to act as the trustee to hold the house until the children will become old enough under the law formally, would be Gilbert Fisher, Jr.?

A Yes.

Q There would be nothing unusual about that, the son acting as a trustee in a transaction like that?

A Not at all.

Q You drafted Exhibit 84, which is the trust agreement, dated the 29th of August, 1969; is that correct?

A Yes, I did. I drafted it.

8-2 Q I think you have indicated that you had conversations with Mr. and Mrs. Fisher, Sr. about that agreement, which is Exhibit 84.

A I don't think I said that.

Q What is your recollection?

A My recollection is that I may have had a conversation with them, and I may have a conversation with Mr. Gilbert Fisher, Jr. I don't recall precisely with whom I spoke. I may have spoken with all three.

Q And you are talking about this conversation that you may have had with the two elder Fishers and younger Mr. Fisher, that is, prior to the time you actually drew up the deed?

A Oh, yes.

Q The trust agreement, rather?

A Yes. It is a deed.

Q In any event, you spoke to some or all of the three of them prior to the preparation of that deed?

A I have no specific recollection.

Q As to which one you spoke to?

A Yes. Whether I just spoke to Mr. Gilbert Fisher, Jr. or Mr. Fisher, Sr. or Lulu Fisher, I have no distinct recollection.

Q In any event, after preparing the deed, Exhibit 84, you then sat down and discussed it with Mr. and Mrs. Fisher, Sr. and explained the document to them?

A I did.

Q They indicated to you that they understood the

document as you explained it to them and it was acceptable?

A That's right. I would not have permitted them to sign it and take their acknowledgment unless I was absolutely satisfied they understood.

Q They then signed it and acknowledged it?

A They signed it and I acknowledged their signatures, yes, sir.

MR. NAFTALIS: I have nothing further, your Honor.

MR. FEINBERG: Just a few questions, your Honor.

REDIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Nussman, you have testified that it is not unusual for a son to negotiate with you on behalf of the parents; is that right?

A Yes, sir.

Q Is it unusual for a son or for anybody to come in to your office with $16,000 in a brown paper bag?

MR. NAFTALIS: I object to that.

THE COURT: Overruled.

Q Is that unusual?

A (Pause) It does not happen very often.

Q Has it ever happened to you, that much money?

A (Pause) I have difficulty recalling another instance.

Q Mr. Nussman, you have testified that you assumed that you represented the elder Fishers?

A Yes.

Q What was the basis of that assumption?

A Well, when Mr. Gross first came in with Mr. Fisher I was told to make the assignment to Mr. and Mrs., Lulu Fisher. Both were in my office once on once occasion and I made the assumption all along that they were my clients and Mr. Fisher was acting for them.

Q Did Mr. Fisher say to you that he was acting for the parents when he first came in with Mr. Gross?

A I can't recall whether he specifically did or did not.

Q Yes the great part of your dealings in this case were with Mr. Fisher; is that correct?

A That's correct.

Q In fact, you have only testified that you met the parents on one or two occasions; is that correct?

MR. NAFTALIS: Objection. He said two occasions, not one.

Q Two occasions that you recall.

A A minimum of two. It might have been three, but a minimum of two.

Q Any more than three?

A No.

Q When you wrote those three letters to Mentes Construction Company, concerning delays in the house or extras, these were written after you spoke to Mr. Fisher, Jr.; is that right?

A Well, apparently from reading the letters I had calls from at least three people. One was Mr. Gross, I think, who called me on one occasion. That's indicated in the letter. Mr. Fisher -- I got a call from a Mrs. Fisher, and I spoke to Mr. Fisher, Jr.

Q Mrs. Fisher? Did you ever met a Bernice Fisher?

A Yes, I did.

Q And could that have been the person?

MR. NAFTALIS: I object to that: "Could that have been."

THE COURT: He said, "A Mrs. Fisher." That's what he testified to.

Who is the Mrs. Fisher?

THE WITNESS: Well, the Mrs. Fisher I have reference to is Lulu Fisher.

Q You have spoken to Bernice Fisher?

A Yes.

MR. FEINBERG: I have no further questions.

RECROSS-EXAMINATION

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BY MR. NAFTALIS:

Q You indicated that you had spoken with your clients, Mr. and Mrs. Fisher, Sr., on two or more occasions; is that correct?

A Yes.

Q And, in addition, you had corresponded with them, right? On at least one occasion?

A Yes.

Q How many times do you recall actually speaking to Gilbert Fisher, Jr. in person?

A Four, six, half a dozen times.

Q Not a lot? Not a lot of times? You didn't see him 100 times?

MR. FEINBERG: I object.

MR. NAFTALIS: I will take the answer. I am happy with it.

Q By the way, when you received these monies for the purchase of the house, you gave a receipt, did you not.

A Oh, yes.

Q That was all disclosed? Nothing was concealed about this? That is Exhibits 78 and 80?

A Correct. Whatever monies I received were put in my trust account or for fees directly into my account and receipts given.

Q That's your common practice anytime you receive cash from any client? You make a receipt to reflect the cash?

A That's my uniform practice.

MR. NAFTALIS: I have no further questions.

MR. FEINBERG: One final question, if I may.

FURTHER REDIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Nussman, did you ever receive one penny in person from Gilbert Fisher, Sr. or Lulu Fisher?

A To my best recollection, no.

MR. FEINBERG: No further questions.

THE COURT: Since there are no further questions, the witness is excused.

(Witness excused.)

THE COURT: We will take our adjournment for today, members of the jury, and I will ask you to please be inside so we can start promptly tomorrow morning at 10 o'clock.

Good night all.

(Jury excused.)

(At the bench.)

MR. FEINBERG: I want to inform the Court there is a good possibility I will finish tomorrow. Really, it depends, if the documents continue to go in the way Mr. Naftalis has allowed them to go in, graciously --

THE COURT: I will expect requests from both sides to be in by the close of the government's case.

MR. FEINBERG: Does your Honor want all new requests?

THE COURT: If you want to submit the old ones, all right.

MR. FEINBERG: It is the exact same case.

THE COURT: I will require the defense to have its requests in at the close of the government's case.

MR. NAFTALIS: With your permission, I don't have a secretary now. I am culling two or three requests to be typed in the morning. May I have permission to hand it in when she gets it typed during the course of the day?

THE COURT: That's all right.

(Time noted: 5:05 p. m.)

(Adjourned to November 7, 1974.)

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

J. Feinfeld

United States of America

v. 74 Cr. 388

Gilbert Fisher, Jr.

November 7, 1974
10:00 a.m.

(Trial resumed.)

(In open court, jury present.)

THE COURT: Proceed.

MR. FEINBERG: The Government calls Eugene Mentes.

. . .

E U G E N E V A N H O U T E N M E N T E S,

called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Mentes, I ask that you keep your voice up and speak loudly in the direction of the jury so everyone can hear you.

A Right.

Q How are you employed, sir?

A I am a builder, self-employed.

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Q What is the namte of your company?

A Mentes Construction Company.

Q Where is it located?

A Oradell, New Jersey.

Q How long have you had the Mentes Construction Company?

A Since 1951.

Q What is the nature of your business?

A Home building.

Q Where?

A Northern New Jersey, Bergen County.

Q Do you know the defendant Gilbert Fisher, Jr.?

A Yes, sir, I do.

Q Can you identify him?

A Yes.

Q Would you point him out, please?

A (Indicates.)

MR. FEINBERG: May the record reflect the identification.

Q When did you first meet Mr. Fisher?

A In the early part of 1967.

Q Where did you meet him?

A Teaneck Realties Office, I believe.

Q Who was present, to the best of your recollection?

eo:mg 3

A Mr. Fisher, Sidney Gross and myself.

Q Did you have a conversation with Mr. Fisher at that time?

A Yes.

Q What was the conversation?

A Well, we discussed building a home on this property in Englewood.

Q In Englewood?

A Yes.

Q Did there come a time when you prepared plans for building a home at 446 North Woodland Street in Englewood, New Jersey?

A Yes, sir.

Q When?

A The early part of 1967.

Q Did you discuss preparing the plans with anybody?

A Yes, I discussed them with Mr. Gross.

Q Is that Sidney Gross?

A Yes.

Q Who is Sidney Gross?

A He is a realtor, Teaneck Realty.

Q Did you receive any money from Mr. Gross?

A Yes.

Q I show you,first, Government's Exhibit 86 marked

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for identification, and ask if you can identify that, sir.

Speak up, please, to the jury.

A Yes, this is $500 I received towards the permits and plans for the home.

Q Is that your signature, sir?

A Yes.

Q Is this the contract between Lulu Fisher and Mentes Construction Company?

A Yes.

Q I show you 87 for identification and ask if you can identify that.

A Yes.

THE COURT: You get close to the witness. That is one of the problems all the time. You stand close to the witness and the jurors don't hear you.

All the jurors have to hear you. Please raise your voice. I understand some of the jurors did not hear.

Is that right?

Suppose you go back now and read his testimony about four or five questions;that will be sufficient.

(Record read.)

Q What is 87?

A This is a receipt for the deposit of $500.

Q Is that your receipt?

A Yes.

Q Is this a receipt, sir, or a deposit slip?

A Deposit slip.

Q That is your deposit slip?

A Yes.

MR. FEINBERG: The Government offers 86 and 87.

MR. NAFTALIS: No objection.

xx (Government's Exhibits 86 and 87 received in evidence.)

MR. FEINBERG: May I read 86, your Honor?

(Mr. Feinberg read Government's Exhibit 86 in evidence to the jury.)

Q Let me just ask you, Mr. Mentes, at the time that this document was prepared on March 27th,1967, had you ever met Lulu Fisher?

A I believe I had met them at Teaneck Realty's office, yes.

Q Had you had a conversation with her?

A With who, Lulu Fisher?

Q Lulu Fisher.

A I don't recall Lulu Fisher, no.

Q Did there come a time when you met with Gilbert Fisher, Jr.?

A Repeat that, please.

Q Did there come a time when you again met with Mr. Fisher?

A Yes.

Q Directing your attention to on or about April 13, of 1967, did you meet with Mr. Fisher on that day?

A Probably thereabouts. I don't know the exact dates.

Q Well, I show you Government Exhibit 88 in evidence and ask if you can recognize that, sir?

A Yes.

Q What is that?

A This is the agreement.

Q What agreement?

A Between Gilbert Fisher, Sr. and Lulu Fisher, his wife.

Q What is that agreement, sir; for what?

A And Mentes Construction, rather.

Q Is that for the construction of the house?

A Yes.

Q Is that agreement dated, sir?

A Yes.

Q What is the date?

A April 13, 1967.

Q Keep your voice up.

And on April 13, 1967, did you meet with Gilbert Fisher, Jr.?

MR. NAFTALIS: Objection to the leading.

He can ask him who he met with, but he doesn't have to lead him.

THE COURT: Please avoid leading questions and let's eliminate these problems.

Q On or about April 13, did you have a meeting?

A Yes.

Q Who was present, to the best of your recollection?

A I believe it was Sidney Gross from Teaneck Realty. He handled the transaction.

THE COURT: You are dropping your voice again.

Won't you please speak up and speak distinctly?

A I believe it was Sidney Gross from Teaneck Realty. He handled most of the transactions.

Q Was anybody else present that you recall?

A No.

Q Where was this meeting?

A At Teaneck Realty's office.

Q What were the circumstances, what occurred at that meeting?

A We discussed the contract and the plans and building permits.

Q At the close of this meeting, did any money exchange hands?

A On the contract I received the 10%.

Q How much did the contract call for?

A $4500, I believe.

Q What did the contract call for?

A $4500.

Q $4500?

A $4500.

THE COURT: Are you asking for the payment or the total contract price?

Your question is not clear to the witness.

Q I am sorry, the total contract price, sir.

A The total contract price was $45,000.

Q I show you Government Exhibit 89 and ask if you can identify that.

A Yes, this is the deposit slip for the $4500 that I received on contract.

Q Are there any other figures on that deposit slip besides the $4500?

A Yes. $200. I believe that was something else, refund on a bond.

MR. FEINBERG: The government offers Exhibit 89.

MR. NAFTALIS: One question on voir dire, your Honor.

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. NAFTALIS:

Q Good morning.

I think this deposit slip for the Mentes Construction Company, Exhibit 89 for identification, lists two deposits; is that correct?

A Yes.

Q A $4500 deposit and a $200 deposit?

A Yes.

Q Does this $200 deposit have anything to do with the house you were building for Lulu Fisher?

A No.

MR. NAFTALIS: I take it you are only offering the other part?

MR. FEINBERG: Correct.

MR. NAFTALIS: No objection, your Honor.

XXX

(Government Exhibit 89 received in evidence.)

BY MR. FEINBERG:

Q Who gave you this $4500? Do you recall?

A I believe it was Sidney Gross.

Q Did there come a time when you began construction on the house in Englewood?

A Yes.

Q How long did it take to complete the house?

A About six or seven months.

Q In the course of construction, did any problems arise relating to the construction of the house?

A A few.

Q Would you describe the problems?

A Well, there were a few delays, a few extras, and whatnot. Not too many problems.

Q When these problems arose, whom did you discuss these problems with, if anybody?

A Teaneck Realty, Sidney Gross, and Mr. Fisher.

Q Which Mr. Fisher? Senior or Junior?

A Junior.

Q Did you ever discuss any of the problems with Mr. Fisher, Sr. or Lulu Fisher?

A No.

Q Where did you discuss these problems with Mr.

Fisher?

A On the job site.

Q Would he come to the job site?

A Yes.

2-2 Q While you were constructing the house, Mr. Mentes, were any payments made to you?

A Yes.

Q Who made the payments?

A Mr. Fisher, Jr.

Q Did Mr. Fisher, Sr. or Lulu Fisher ever make any payments to you?

A No.

Q Were the payments made to you in cash or check?

MR. NAFTALIS: Objection. Leading. He can ask him how the payments were made.

Q How were the payments made?

A Mostly cash, some checks.

Q What did you do with the money you received, if anything?

A I deposited it in the bank.

Q I show you Government Exhibit 90 for identification. I ask you if you can identify that, sir?

A Yes. This is a check for $2950.

Q Is it a check, sir, or a slip?

A A check.

Q Let me ask you this: What is this piece of paper itself?

A This is the deposit slip for the $2950 check.

Q I show you Exhibit 90A for identification and ask you if you can identify that document.

A Yes. This is a $2500 payment on the foundation as per contract, and $200 for an extra sliding door in the basement, $250 for an extra picture window in the basement, total of $2950.

Q Is this deposit slip the money for this bill?

A Yes, it is.

MR. FEINBERG: The Government offers Exhibits 90 and 90A in evidence.

MR. NAFTALIS: No objection.

XXX (Government Exhibits 90 and 90A received in evidence.)

(Mr. Feinberg read to the jury from Government Exhibits 90 and 90A in evidence.)

Q I show you Government Exhibit 91 for identification and I ask you if you can identify that, sir.

A Yes. This is the deposit slip for the roof payment, $16,000 in cash.

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Q Who paid you that $16,000 in cash?

A Mr. Fisher, Jr.

Q How did the money come to you? In what form? Do you recall, sir?

A In cash.

Q What type of cash?

A Small bills.

Q Where did you get that money, sir?

A This payment was made at Teaneck Realty's office.

Q I show you Government Exhibit 91A and ask you if you can identify that.

A This is a receipt from me that I received $16,000 from Mr. Fisher.

MR. FEINBERG: The government offers Exhibits 91 and 91A into evidence.

MR. NAFTALIS: No objection.

XXX (Government Exhibits 91 and 91A received in evidence.)

(Mr. Feinberg read to the jury from Government Exhibits 91 and 91A in evidence.)

Q Mr. Mentes, I show you Government Exhibit 92 and ask you if you can identify that, sir.

A Yes. This is a deposit slip for the second payment on Mr. Fisher's house, $13,880 in cash.

Q Whom did you receive that cash from, sir?

A Mr. Fisher.

Q Where?

A At the job site.

Q What happened at the job site, sir, on that day?

A Mr. Fisher delivered the money to me and I asked him if we should count it, and he said, "Go about your business and take it to the bank. Everything should be there."

Q What form did the money take, sir?

MR. NAFTALIS: Objection. Asked and answered. He said it was cash.

Q What form did the cash take, sir?

MR. NAFTALIS: I object. I don't understand.

THE COURT: Objection overruled. The question is perfectly clear to me.

What were the demoninations of the cash, if you can recall?

A 5's, 10's, and 20's, I believe.

Q Was the cash delivered in anything?

A Yes. A brown paper bag.

MR. FEINBERG: The Government offers 92.

MR. NAFTALIS: No objection.

xx (Government Exhibit 92 received in evidence.)

(Mr. Feinberg read from Government's Exhibit 92 in evidence to the jury.)

Q Mr. Mentez, I show you 92A for identification. Can you identify that, sir?

A Yes, this is a deposit slip for the boiler payment on the Fisher job, $4,000 by check.

Q And do you recall who paid you that $4,000, sir?

A Not really. It couldhave been Mr. Fisher or his lawyer or Teaneck Realty.

MR. FEINBERG: The Government offers 92A.

MR.NAFTALIS: No objection.

xx (Government's Exhibit 92A received in evidence.)

(Mr. Feinberg read from Government Exhibit 92A in evidence to the jury.)

Q Mr. Mentes, did you receive any other money from Gilbert Fisher, Jr.?

MR.NAFTALIS: I object. He can ask a question whether he received any money from anybody else or anybody in connection with this job because some of the testimony has been from Mr. Fisher and some he doesn't remember.

Let him ask whether he got any other money.

Q Did you receiva ny other money from anybody in connection with this job?

A I don't recall exactly. It could have been any one of the three, Mr. Fisher, his attorney, or Gross.

Q But did you receive money from someone?

A Oh, sure.

Q I show you Government Exhibit 92B and ask if you can identify that, sir.

A This is a bill from Teaneck Realty, received payment in full, signed by Sidney E.Gross, for $6,000 for services rendered.

Q What services, sir?

A Teal estate commission.

Q Did you pay Mr. Gross?

A Yes.

Q How much did you pay him?

A $6,000.

Q Where did you get that money to pay Mr. Gross?

A From Mr. Fisher.

MR. FEINBERG: The Government offers 92B.

MR.NAFTALIS: No objection.

xx (Government's Exhibit 92 B received in evidence.)

(Mr. Feinberg read from Government Exhibit 92B in evidence to the jury.)

Q Mr. Mentes, you testified that there were certain extras on this job, is that correct?

A Yes.

Q I show you Government Exhibit 94 for identification.

Can you identify that, sir?

A Yes. These are bills for extras.

Do you want the total?

MR. FEINBERG: No, the document speaks for itself.

Q Can you identify this document, though?

A It is a statement with the extras.

Q This is your statement?

A Right.

MR. FEINBERG: The Government offers 94.

MR.NAFTALIS: No objection.

xx (Government Exhibit 94 received in evidence.)

(Mr. Feinberg read from Government's Exhibit 94 in evidence to the jury.)

Q Mr. Mentes, were these extras paid for, sir?

A Yes.

Q Do you recall,sir, from your own recollection, who paid for those extras?

A Mr. Fisher.

Q Mr. Mentes, I show you, finally, Government Exhibit

95 and ask if you can identify that document, sir.

A This is a bill for blasting from C. M. O'Connor, Inc., for $800.

Q When you say blasting, could you describe a little bit what that is, sir?

A Blasting the rock on the job site.

Q Who paid Mr. O'Connor to the best of your knowledge?

A I paid him.

Q Did you get the $800, sir?

A Yes.

Q Where did you get the $800?

A From Mr. Fisher.

MR. FEINBERG: The Government offers 95.

MR.NAFTALIS: No objection.

xx (Government Exhibit 95 received in evidence.)

(Mr. Feinberg read from Government Exhibit 95 in evidence to the jury.)

Q Mr. Mentes, was the total sum for the construction of this house paid?

A Was it paid?

Q Yes.

A Yes.

Q Did you ever visit the house after the construction

was completed?

A Yes.

Q When, do you recall, sir?

A I don't know exactly. A month or so later, probably.

Q Could you describe the house?

A Yes, it was beautiful.

Q Who did you visit when you went to the house, do you recall, if anyone?

A Mrs. Fisher was there and two children, I believe.

MR. FEINBERG: No further questions.

THE COURT: Who is Mrs.Fisher?

Q Who is Mrs. Fisher?

A Mrs. Lulu Fisher.

Q That is the elderly Mrs. Fisher, is that correct?

A No.

Q The young Mrs. Fisher?

A The young Mrs. Fisher.

Q Do you know what her name was, sir?

A No, I thought it was Lulu.

MR. FEINBERG: No further questions.

CROSS-EXAMINATION

BY MR. NAFTALIS:

Q Mr. Mentes, you have given some testimony, have

you not, about a house that you built in Englewood, New Jersey, is that correct?

A Yes.

Q This house was built pursuant to a contract, was it not, that you signed by which you were retained?

A Yes.

Q That contract is Exhibit 88 in evidence, is that not right?

A Yes.

Q That contract-- the date of that contract is April 13, 1967, is that correct?

A That is correct.

Q I think you indicated some difficulty in remembering who was there at the date the contract was signed; is that correct?

A Yes.

Q Why don't we look and see the signature page?

There are a number of signatures on this contract, are there not?

A Yes.

Q One of them there is a man by the name of David Greenberg?

A Yes.

Q David Greenberg is your attorney?

A Yes.

Q And he is signing there, is he not, to witness the signature of the purchasers of the house, the people who have contracted you, is that correct?

A No, he is witnessing my signature, I believe, and my wife's signature as secretary.

Q Doesn't it say "David S. Greenberg"as to owners and then right next to it are the signatures of the owners, Gilbert Fisher, Sr. and Lulu Fisher, is that correct?

A Yes.

Q Then underneath it is your signature as president?

A Yes.

Q So you signed that contract that dayin the presence of Mr. and Mrs. Fisher, Sr., is that not right?

A No.

Q You did not?

A I do not believe so. I think that is why Mr. Greenberg is witnessing their signatures and it was brought back to me to sign and my wife.

Q Wasn't the contract all signed at one time at one place?

A No.

Q You don't remember that?

THE COURT: He said no. He did not say he did not remember.

MR.NAFTALIS: I'm sorry.

Q You have met Mr. Fisher, Sr., have you not, and Mrs. Lulu Fisher?

A I believe I saw them once.

Q You have seen them a couple of times, haven't you?

MR. EINBERG: Your Honor, when we talk about Mrs. Lulu Fisher, the witness aid he thought the younger woman was Lulu Fisher.

MR. NAFTALIS: Mr. Feinberg can argue to the jury later.

THE COURT: You can take it up on redirect.

Q You have met the elderly Mr. Fisher and his wife a couple of times, not this gentleman?

A No.

Q You remember when you testified here in September?

A I could take that back. I probably saw them at the real estate office and then, on the end, at the closing probably.

Q That is, you saw them from time to time during the course of the deal?

A Yes.

Q I think you have indicated, have you not, that most of the dealings on the home, the construction of the home, were with a man named Sidney Gross? Is that right?

MR. FEINBERG: I object. That's not the testimony.

THE COURT: Objection sustained.

Q Let me ask you directly: Weren't most of your dealings regarding the construction of this house with Mr. Sidney Gross?

A I would not say most were, no.

Q You will not say that?

A Between his attorney, Mr. Nussman, and Mr. Gross, and MR. Fisher.

Q Mr. Mentes, do you remember you testified here in September before Mr. Feinberg?

A Yes.

Q You testified under oath. Do you remember you were asked this question, and did you give this answer?

Page 639:

"Q And wasn't most of your dealings in respect to the construction of this house with Mr. Gross?

"A Yes."

Do you recall being asked that question and giving that answer?

A I don't recall it that well. In the beginning they were with him, yes.

Q I asked you, isn't that what you testified to in September?

A Probably. I don't remember my testimony in September.

MR. NAFTALIS: Mr. Feinberg, you will stipulate to the accuracy as to what he testified to?

MR. FEINBERG: I will stipulate to the accuracy in the transcript, yes.

Q Mr. Gross was a real estate man, was he not, a broker?

A Yes.

Q It was his job to look after the interests of the Fishers in this transaction?

A Yes.

Q As a matter of fact, from time to time you and Mr. Gross would have discussions about whether or not the house

was being built as quickly as possible?

A Yes.

Q Then there were times when Mr. Gross felt it was not and he spoke to Mr. Nussman the lawyer for the Fishers; is that correct?

MR. FEINBERG: I object to the question.

THE COURT: I will let him answer.

Q Is that correct?

A Yes.

Q As a matter of fact, you received letters from Mr. Nussman, did you not, complaining about the progress of the job and how it was being performed?

MR. FEINBERG: Objection, your Honor. Irrelevant.

THE COURT: I don't know it is relevant, but we will save time by allowing him to answer. Let him answer the question and proceed to the next question.

Q Is that correct?

A Repeat that, please.

THE COURT: Did you get communications from time to time from Mr. Nussman with respect to the job?

THE WITNESS: Yes.

Q I show you Government Exhibit 83 consisting of three letters. Those are letters that you received, were they not, from Mr. Nussman indicating complaints about the

progress of the job?

A Yes.

Q You notice, do you not, that the first of these letters goes, carbon copy, to the elder Mr. Fisher, Fisher, Sr., and then to the Teaneck Realty, Mr. Gross?

A Yes.

Q There came a time, did there not, when the City of Englewood, New Jersey, issued something called a certificate of occupancy for the house when it was completed?

A Yes.

Q You received that, did you not?

A Yes.

Q You passed it on to the owner of the house?

A Yes.

Q You passed it on to the elder Mr. Fisher, Mr. Fisher, Sr., did you not?

A It was passed on at Nussman's office at the closing. I don't know who issued it.

Q Didn't you pass it along to the elder Mr. Fisher and his wife -- not this man -- to Gilbert Fisher, Sr.?

A His attorney handled everything at the closing. I don't know what he did with it.

Q Do you recall when you testified here in September being questioned and answering these questions? 427

Pages 646 to 647:

"Q Mr. Mentes, was a certificate of occupancy issued by the City of Englewood for this house?

"A Yes.

"Q Do you know in whose name that certificate was issued?

"A No, I don't. It usually is normally just issued to me as the contractor. It wouldn't necessarily have anybody's name on it.

"Q Would it be issued to you as a contractor?

"A Yes.

"Q What did you do with it in turn? Pass it along?

"A Passed it along to the owner.

"Q To the owner?

"A Yes.

"Q You passed it along to Gilbert Fisher, Sr. and Lulu Fisher, his wife?

"A Yes."

Do you recall being asked those questions and giving those answers under oath here in September?

A Yes.

MR. NAFTALIS: I have nothing else.

MR. FEINBERG: I have no redirect examination.

THE COURT: Call the next witness.

(Witness excused.)

R O B E R T B A E N A, called by the government, after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Baena, I will ask you to speak loudly and in the direction of the jury so everyone can hear you.

How are you employed, sir?

A Self-employed.

Q What type of business?

A Furniture and decorating.

Q What is the name of this?

A Baena Decorators.

Q Where is it located?

A 1970 Jerome Avenue in the Bronx.

Q How long have you been so employed?

A About 40 years.

Q Are you in business with anyone else?

A Brother.

Q What is the nature of your business?

A Selling furniture and some decorating.

Q Directing your attention to the years 1967 through

1970, did you have any business dealings during this period with Gilbert Fisher, Jr.?

A Yes, I did.

Q Bernice Fisher?

A Mostly with her.

Q Mostly with her?

A Yes.

Q Can you tell the court and jury the nature of these dealings?

A I sold them some furniture, some drapes, some accessories.

Q Do you know, sir, from your own knowledge, where these drapes, furniture, and accessories went? Where was it for?

A For the house, living room mostly.

Q What house, if you know?

A In Englewood.

Q Have you had an opportunity to examine your business records for the years 1967 through 1970 concerning dealings with Gilbert Fisher and Bernice Fisher?

A Yes.

4-2 Q What did you find, if anything?

MR. NAFTALIS: Objection, your Honor. Produce the records.

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THE COURT: Sustained.

Q First, I show you Government Exhibit 98 for identification. I ask you if you can identify that?

A Yes, I can.

Q What is that, sir?

A It is a list of items that I furnished for Mr. and Mrs. Fisher.

Q What is the document itself?

A It is a bill for 6 or 7 items that were sold to the Fishers.

Q Is there a date on that bill?

A October 30, 1968.

Q Also attached, sir, can you describe the second page of that document?

A It is the list of other items that I sold to Mr. and Mrs. Fisher.

Q What is the date on that?

A May 9, 1969.

MR. FEINBERG: The Government offers Exhibit 98 in evidence.

MR. NAFTALIS: No objection.

XXX (Government Exhibit 98 received in evidence.)

(Mr. Feinberg read to the jury from Government 98 in evidence.)

Q Mr. Baena, I show you Government Exhibit 99 for identification and ask if you can identify that, sir.

A Yes, I can.

Q What is that, sir?

A This is a duplicate of moneys received that were recorded in our ledger book from Mr. and Mrs. Fisher.

Q Do you recall this-- can you recognize this, sir, as your records? Can you identify that as your own personal records?

A Yes, because I furnished them.

MR. FEINBERG: The Government offers 99.

MR.NAFTALIS: No objection.

xx (Government Exhibit 99 received in evidence.)

Q Mr. Baena, to the best of your own knowledge, sir, do you know if these payments in Government's Exhibits 98 and 99 were made by check or in cash?

A They had to be either cash or certified check.

Q Mr. Baena, to the best of your own knowledge, did you have any other business dealings with the Fishers aside from the dealings reflected in 98 and 99?

A Yes.

Q When?

A A little bit after the first bills. I'd guess 1969, 1970. Probably 1969. I am not sure.

Q What were the nature of these dealings?

A I made a sofa and some chairs and a couple of other pieces. I don't remember exactly because it has been a while.

Q To the best of your own knowledge, how much money was spent in buying these items?

A At least $3,000 or $4,000.

Q Do you recall-- I'm sorry. Do you have any records, sir, pertaining to these items?

A No, I don't.

Q Where are the records, do you know, sir?

A We had a break-in and we had a flood and everything went and we couldn't piece it together. We tried, but we couldn't find a lot of records for a lot of people.

Q Mr. Baena, did you ever visit 446 Woodland Street in Englewood, New Jersey?

A Yes, I did.

Q When was that, sir?

A In 196, 1969.

Q What was the purpose of your visit?

A To do decorating.

Q Who was present, do you recall, sir?

A Mrs. Fisher.

Q Do you know Mrs. Fisher's first name?

A Yes, Bernice Fisher.

Q Can you describe the home?

A It is a very nice home.

Q Mr. Baena, did the Fishers pay their bills on time?

A They did at the beginning and then it tapered off at the end.

MR. FEINBERG: No further questions.

CROSS -EXAMINATION

BY MR. NAFTALIS:

Q Mr. Baena, you said that these bills were either paid by cash or certified check, is that correct?

A Usually they are, yes.

Q As a matter of fact, you require either cash or a certified check payment?

A Right.

Q As a matter of fact, it says that is the only payments that you will take will be either cash or certified check?

A Right.

MR. NAFTALIS: Nothing else.

MR. FEINBERG: No redirect.

THE COURT: You are excused, sir.

(Witness excused.)

THE COURT: Call your next witness.

MR. FEINBERG: Leonard Reynolds.

...

L E O N A R D R E Y N O L D S, called as a witness by the Government, hving been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Reynolds, I ask that you speak up loudly and inthat direction (indicating).

How are you currently employed, sir?

A I am president of Harlen Pools, Inc.

Q How do you spell that?

A H-a-r-l-e-n Pools, Inc.

Q How were you employed, sir, in July of 1967?

A I was a representative for Sylvan Pools of Doylestown, Pennsylvania.

Q How do you spell Sylvan?

A S-y-l-v-a-n.

Q What did your duties entail in July of 1967?

A My responsibility was to cover the North Jersey, Westchester, Connecticut area on leads supplied by my company for the installation of swimming pools.

Q Directing your attention to July of 1967, did you have any business dealings during this period with Gilbert

Fisher, Jr.?

A I did.

Q Do you see Mr. Fisher in the courtroom?

A I do.

Q Would you point him out, please?

A The gentleman at that table.

MR. FEINBERG: May the record reflect the identification.

Q Could you tell the Court and the jury the nature of these dealings?

A I was supplied a lead and called, I believe, a New York telephone number and made an appointment which consequently turned out to be Mr. Fisher and myself.

We discussed a swimming pool at Woodland Road in Englewood, New Jersey.

We designed it, placed it, and spent about an hour and a half in so doing.

Q Where, sir, where did you meet with Mr. Fisher?

A At Woodland Road in Englewood, New Jersey.

Q How well do you know the Englewood area, Mr. Reynolds?

A I had been servicing that area since 1960 when I started with Sylvan Pools, and had several installations in that location.

Q What type of area is it, how would you describe it?

A I would say upper-middle income.

Q When you arrived at the site in Englewood, did you see the home?

A I do believe that at that time it was either being built and was well along and closed in, but there were no furnishings or whatever in the interior.

Q What discussions did you have with Mr. Fisher at that time?

A My discussions were primarily the swimming pool in detail and what was involved, what equipment went into the pool, the cost of the pool ultimately, and at the close of our conversation, he suggested that I prepare our agreement, which he more or less verbally suggested was an agreement.

I prepared it and duly signed it and he suggested that I leave it with him and that he would call me in a day or two to give me the contract back.

Q I show you Government Exhibit 96 for identification.

Can you identify it?

A Yes, I do.

Q What is that?

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A This is a typical Sylvan Pool contract which contains my signature, dated 7-14-67.

Q Is that the contract, sir, that you presented to Mr. Fisher?

A Yes, it was.

MR. FEINBERG: The Government offers 96.

MR.NAFTALIS: No objection.

xx (Government Exhibit 96 received in evidence.)

(Mr. Feinberg read from Government Exhibit 96 in evidence to the jury.)

Q Did you receive the $200 deposit, Mr. Reynolds?

A When I was called back to arrange again to meet at the house on Woodland Road,I was given this contract, and I believe a check that was signed by one of the signatories on the bottom of that contract.

Q Who did you meet with when you got the contract back?

A Mr. Fisher.

Q Did you ever meet with the signatories of the contract?

A I did not.

Q Could you describe the swimming pool, sir, to the Court and the jury?

MR. NAFTALIS: Objection. It is described in the

contract. The document speaks for itself.

MR. FEINBERG: I won't take the time now, your Honor.

Q After you received the check, Mr. Reynolds, what happened then?

A My normal procedure was to prepare what you might call the engineering layout for the physical positioning of the pool on the property and I in turn submitted it to headquarters, Doylestown, Pennsylvania.

It was turned over to the construction department and they consequently built the pool.

Q Mr. Reynolds, in all of your dealings concerning this contract, did you ever meet with Lulu Fisher or Gilbert Fisher, Sr.?

A I did not.

MR. FEINBERG: The Government would offer 97. As redacted, I offer 97 in evidence.

MR.NAFTALIS: No objection as redacted.

xx (Government Exhibit 97 received in evidence)

(Mr. Feinberg read from Government Exhibit 97 in evidence to the jury.)

MR. FEINBERG: I have no further questions of this witness.

MR. NAFTALIS: I have no questions.

THE COURT: You are excused.

(Witness excused.)

MR. FEINBERG: Your Honor, at this time the Government has some documents to offer in evidence.

MR. NAFTALIS: Actually, your Honor, could we get him back, I do have one question.

MR. FEINBERG: I have no objection.

L E O N A R D R E Y N O L D S, resumed:

CROSS-EXAMINATION

BY MR. NAFTALIS:

Q Thank you for coming back, Mr. Reynolds.

At the time you received the contract which was signed by Gilbert Fisher, Sr. and Lulu Fisher for the construction of this pool, I think you indicated that you received a check which covered, I guess it was $200, the deposit on the pool?

A Right.

Q And that check was signed by Lulu Fisher, was it not?

A Yes, I believe it was, yes.

MR. NAFTALIS: Thank you.

I have no further questions.

(Witness excused.)

MR. FEINBERG: Your Honor, at this time the

Government offers 100 and 101 in evidence.

MR. NAFTALIS: No objection.

xx (Government Exhibit 100 and 101 received in evidence.)

(Mr. Feinberg read from Government Exhibits 100 and 101 in evidence to the jury.)

MR. FEINBERG: The Government offers 102 in evidence.

MR. NAFTALIS: No objection.

Mr. Feinberg told me only the parts that are relevant are being offered.

There are some other items and some other accounts that he said will be redacted from this exhibit.

xx (Government's Exhibit 102 received in evidence.)

(Mr. Feinberg read from Government Exhibit 102 in evidence to the jury.)

MR. FEINBERG: The Government offers into evidence 102A marked for identification.

MR. NAFTALIS: No objection.

xx (Government Exhibit 102A received in evidence.)

(Mr. Feinberg read from Government Exhibit 102A in evidence to the jury.)

MR. FEINBERG: The Government offers into evidence 103 marked for identification. As redacted, the Government

re-offers 103.

MR.NAFTALIS: No objection.

(Government's Exhibit 103 received in evidence.)

(Mr. Feinberg read from Government Exhibit 103 in evidence to the jury.)

MR. FEINBERG: The Government offers into evidence 104.

MR. NAFTALIS: I have no objection.

(Government Exhibit 104 received in evidence.)

(Mr. Feinberg read from Government Exhibit 104 in evidence to the jury)

MR. FEINBERG: Finally, the Government would offer 105 marked for identification into evidence.

MR. NAFTALIS: Your Honor, I am sure I am not going to have any objection. These are just phone bills, but can Mr. Feinberg just reserve on the offer for a moment while I just look at it and maybe go on to something else.

During the course of the morning, I am sure I will say I have no objection.

THE COURT: We will take our mid-morning recess and you can look at it during the recess.

(Recess.)

(Jury in box.)

MR. FEINBERG: The government reoffers Exhibit 105 as redacted.

MR. NAFTALIS: No objection.

XXX (Government Exhibit 105 received in evidence.)

(Mr. Feinberg read to the jury from Government Exhibit 105 in evidence.)

MR. FEINBERG: Your Honor, the government calls Edward Gonzalez.

E D W A R D G O N Z A L E Z, called as a witness by the government, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Gonzalez, I ask you to speak in a loud voice and direct your attention that way towards the jury.

Mr. Gonzalez, directing your attention to February of 1970, how were you employed at that time?

A I was employed by Jaguar MG of New York.

Q What is that, please?

A That's an automobile dealership.

Q Where was the business located?

A 32 East 57th Street.

Q How long were you employed by Jaguar MG?

A At that time?

Q Yes.

A Approximately three years.

Q As a salesman of Jaguar, have you examined certain business records with regard to the sale of a Jaguar to Bernice Duncan in 1970?

A Yes.

Q I show you Government Exhibit 107 marked for identification. I ask you to examine that, sir?

A (Pause)

Q Can you identify that?

A Yes.

Q What is that?

A We have a final bill of sale for an automobile, a sale contract, and the deposit slip for monies received, and a record sheet of monies kept by the office.

Q You can identify this, sir?

A Yes.

Q Did you participate, sir, to the best of your recollection, in that transaction?

A Yes.

MR. FEINBERG: The Government offers Exhibit 107 in evidence.

MR. NAFTALIS: No objection.

(Government Exhibit 107 received in evidence.)

XXX

(Mr. Feinberg read to the jury from Government Exhibit 107 in evidence.)

Q Mr. Gonzalez, you have testified that you participated in this transaction; is that correct?

A Yes.

Q Who else participated, sir?

A Well, Miss Duncan and Mr. Fisher.

Q Do you see Mr. Fisher in the courtroom?

A Yes.

Q Can you point him out?

A The gentleman over there with the attorney.

MR. FEINBERG: May the record reflect identification.

Q When did you first meet Miss Duncan and Mr. Fisher?

A To the best of my recollection, when they came in and we wrote this contract up.

Q Did they both come in?

A Yes.

Q What happened after they arrived?

A Well, they looked around the showroom and we spoke about cars, and they decided that they wanted to purchase an automobile, so we wrote up an order.

Q Whom did you speak to?

A Well, it is so long ago I will have to say Mr.

Fisher, but I can't pinpoint it, you know -- I just, at this time, can't.

Q Was there a deposit paid at the time in the showroom?

A Yes.

Q Who paid that deposit, to the best of your recollection?

A Well, to the best of my ability, Mr. Fisher did, but it is so long ago --

MR. FEINBERG: No further questions.

CROSS-EXAMINATION

BY MR. NAFTALIS:

Q I think you indicated this transaction was long ago, so you have some trouble remembering the details; is that correct?

A That's correct.

Q The record that is in evidence, exhibit 107, is a contract to Miss Duncan; is that correct?

A That's correct.

Q That indicates that she is the purchaser and you are the salesman?

A That's correct.

Q I take it that the further back, the closer you get to the event, the better your memory is of the event; is

that right?

A Yes.

Repeat that.

MR. NAFTALIS: I guess it is not very clear.

Q You indicated that it is hard to remember these events because they took place quite sometime ago?

A That's right.

Q So your memory of these events was fresher in September than it is now? It was fresher when it was two months closer to the events?

A You would have to say so.

Q And you were here in September, is that right?

A That is correct.

Q When you were asked then whether anybody had a conversation about this automobile transaction and what was said, you said you couldn't recall, is that correct?

MR. FEINBERG: What page, please?

MR. NAFTALIS: 565.

A If that is what is there, I would have to say yes.

Q Your memory was fresher then of the events than it is now, correct?

A Correct.

Q When you were asked in September about who gave the deposit for the automobile, isn't it a fact, sir, that you said to the best of your ability, that you "honestly couldn't recall"?

MR. FEINBERG: I object to that unless Mr. Naftalis is prepared to read the complete statement at 565.

MR. NAFTALIS: Mr. Feinberg can take this up on redirect.

Mr.Feinberg, you can sit down and bring it out on redirect. I will read the question and answer, if you like.

Q Do you remember when you were asked:

"Q Who gave you the deposit?

"A I honestly don't recall."

A That is correct.

Q Then you were asked further by Mr. Feinberg after getting that answer in September:

"Q Was it either Mr. Fisher" --

MR. FEINBERG: I am talking about line 16 on page 565.

MR. NAFTALIS: Your Honor, I will read all the questions and answers.

THE COURT: I would require you to read a full answer.

MR. NAFTALIS: I did. I will be happy to pass it to the jury.

THE COURT: That is again improper. Please don't do that. You know better than that.

MR. NAFTALIS: Yes, sir.

THE COURT: You should know better.

Mr. Feinberg, upon redirect, if he so desires, may read any other question and answer that is relevant to the one that you just put.

MR.NAFTALIS: I will read the whole page.

Q Do you remember you were asked in September these

questions and gave these answers:

"Q Did you have a conversation with either Mr.Fisher or Miss Duncan when they came into the store?

"A Both.

"Q Do you recall what was said at the time?

"A No, sir.

"Q Mr. Gonzalez, what happened after they looked around the showroom?

"A Well, we wrote up a contract and they gave me a deposit for an order.

"Q Is that the contract you wrote up?

"A Yes.

"Q Who gave you the deposit?

"A I honestly don't recall."

Then Mr. Feinberg asked you again, after getting that answer that you honestly did not recall, a question again by Mr. Feinberg:

"Q Do you recall who gave you the deposit?

"A I only recall being given a deposit and I don't remember who gave me the deposit."

Do you recall being asked those questions and giving those answers?

A Yes.

Q I think, as you said, your memory of the events way

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back in 1970 was a little better in September than it is now, isn't that right?

A Yes.

MR. NAFTALIS: Thank you very much.

REDIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Gonzalez, do you recall also being asked this question and giving this answer back in September:

"Q Mr. Gonzalez, what happened after they looked around the showroom?

"A Well, we" --

MR. NAFTALIS: I read that. I read the whole page and a half including that question and answer, and I am only going to have to read again.

THE COURT: You are not going to have to read again.

Are you reading something additional?

MR. FEINBERG: I am reading what Mr. Naftalis siad but it sounds differently the way I read it and the wayMr. Naftalis reads it.

THE COURT: We are going to stop this discussion. Read your question and answer.

"Q Mr. Gonzalez, what happened after they looked around the showroom?"

"A Well, we wrote up a contract and he gave me a deposit for an automobile."

MR. NAFTALIS: Your Honor, I have just one question after that.

RECROSS-EXAMINATION

BY MR. NAFTALIS:

Q Immediately after that question and answer, you were asked the following questions and answers:

"By Mr. Feinberg:

"Q Who gave you the deposit?

"A I honestly don't recall."

Question again by Mr. Feinberg --

THE COURT: Are you going to read what you read before?

MR. NAFTALIS: Yes, but he did.

THE COURT: It is ended. Let's get on with this case, please.

MR. NAFTALIS: May I read one more question and answer?

THE COURT: No, stop it. It is the third time it has been read. Each one of you should know better how to conduct a trial and put the questions and answers.

MR. FEINBERG: No further questions.

MR. NAFTALIS: Thank you.

(Witness excused.)

THE COURT: Call your next witness, please.

MR. FEINBERG: Your Honor, we have some documents to offer at this time.

The Government offers 106.

MR. NAFTALIS: No objection.

xx (Government's Exhibit 106 received in evidence.)

(Mr. Feinberg read from Government's Exhibit 106 in evidence to the jury.)

MR. FEINBERG: The Government offers 108 in evidence.

MR. NAFTALIS: No objection.

xx (Government's Exhibit 108 received in evidence.)

(Mr. Feinberg read from Government Exhibit 108 in evidence to the jury.)

MR. NAFTALIS: I must object to that statement. All it shows is that they made a $1600 cash deposit.

MR. FEINBERG: On the deposit slip of the Macy Cadillac Company.

The Government offers in evidence 109 for identification.

MR. NAFTALIS: May we approach the bench, your Honor.

(At the side bar.)

MR. NAFTALIS: Your Honor, with regard to this, I would object. Your Honor, this is an invoice or receipt or whatever -I am not objecting on authenticity grounds or anything like that - for purchase of an automobile by one Bernice Duncan.

Unlike the situation with Mr. Gonzalez where at least even that I will probably move to strike even Mr. Gonzalez' testimony at the close of the record, there is no showing here that Bernice Duncan is in the same situation as Rosalie Fisher where the Government claims every nickel that Rosalie Fisher spends is money supplied by Gil Fisher.

Here there is no showing like that. There is no evidence or testimony that every nickel or dime that she spends comes of necessity from that man.

I just don't think without any evidence showing that or evidence that he paid for it or gave her the money for it that they can just pop in a record.

THE COURT: Don't spend time on it. Call somebody from Chrysler Plymouth Sales.

MR. FEINBERG: Here is the receipt showing that Mr. Fisher paid for the automobile.

THE COURT: I am not going to spend time on it. You just issue a subpoena and bring the people down here.

MR. FEINBERG: He is right here. I will call Mr.Friedman.

THE COURT: Incidentally, I heard your remark you were going to move to strike the testimony of Mr. Gonzalez. The time to have made the objection was when he was on the witness stand.

MR.NAFTALIS: Yes, your Honor.

Your Honor, my objection had nothing to do with authenticity. Mr. Feinberg said all this witness can testify to is the authentic business record from Chrsyler Plymouth record.

THE COURT: I am suggesting you get the person who had the transaction.

MR. FEINBERG: This is the person but he cannot recall the particular transaction back in 1970.

Your Honor, the document in the divorce proceeding says he lives at this address. The receipt shows that Mr. Fisher paid for the automobile.

THE COURT: Put him on the witness stand to show that it was a record kept in the regular course of business.

(In open court.)

MR. FEINBERG: The Government calls Mr. Jay Friedman to the witness stand.

J A C K F R I E D M A N, called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FEINBERG:

Q Mr. Friedman, I ask that you speak loudly and in the direction of the jury.

How are you employed, sir?

A I am an automobile salesman.

Q For who?

A Chrysler Manhattan Plymouth Sales.

Q Where is that located?

A 1755 Broadway.

Q How long have you been so employed?

A Six and a half years.

Q What do your duties entail?

A I sell automobiles.

Q I show you Government Exhibit 109 for identification and I ask if you can recognize or identify that document.

A Yes. That is an invoice that the customer is given. This is our copy. The customer is given the original of this.

Q Is this invoice made in the ordinary course --

MR. NAFTALIS: I have no objection on authenticity grounds.

THE COURT: Finish your question. We are not going to have any more problems about it.

Q Is this an invoice that is made in the ordinary course of your company's business?

A Yes, it is.

Q Is it in the ordinary course of your company's business to make and maintain records such as this?

A Yes.

Q Attached, sir, are three other pieces of paper. Can you identify those, sir?

A These are receipts that when the customer gives me the money, I bring the money to the cashier. The cashier makes out a receipt such as this and this is attached to the copy of the order.

Q Are these receipts made in the ordinary course of your company's business?

A Yes.

Q Is it in the ordinary course of your company's business to make and maintain receipts such as these?

A Yes, it is.

Q And, sir, does your name appear as the salesman on both the invoice and the receipts?

A Yes.

Q Do you recall with specificity, sir, this particular transaction?

A No, I don't.

MR. FEINBERG: The Government will offer 109.

MR.NAFTALIS: Your Honor, I have no objection on authenticity.

I raise the same objection I raised at the side bar.

THE COURT: Overruled.

xx (Government's Exhibit 109 received in evidence.)

THE COURT: Have you got any questions of this witness?

MR. NAFTALIS: No.

THE COURT: The witness is excused.

(Witness excused.)

(Mr. Feinberg read from Government Exhibit 109 in evidence to the jury.)

MR. FEINBERG: Finally, the Government offers 110 in evidence.

MR. NAFTALIS: Your Honor, the same objection at the side bar and I suppose the same ruling. It is the same sort of document as the last one.

THE COURT: Let me see it, please, if there is an

objection.

THE COURT: Objection overruled.

(Government Exhibit 110 received in evidence.)

(Mr. Feinberg read from Government Exhibit 110 in evidence to the jury.)

MR. FEINBERG: Your Honor, at this time the Government has some documents to offer.

Your Honor, the Government, at this time, would offer into evidence Government's Exhibits 123 through 127.

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MR. NAFTALIS: I have no objection, your Honor.

These are medical bills. Mr. Feinberg has informed me these are bonafide bills and have nothing to do with the other bills that we used earlier in the trial.

MR. FEINBERG: They are correct as to the figures in the computation.

(Government Exhibits 123 through and including 127 received in evidence.)

XXX

(Mr. Feinberg read to the jury from Government Exhibits 123 through and including 127.)

MR. FEINBERG: The government will offer into evidence Government Exhibit 128.

MR. NAFTALIS: No objection.

XXX

(Government Exhibit 128 received in evidence.)

(Mr. Feinberg read to the jury from Government Exhibit 128 in evidence.)

THE COURT: You may be wondering why this exhibit has been offered with the chart. It will soon be made evident to you. It plays a part of the computation that will be submitted to you.

MR. FEINBERG: We have a few more documents that will complete the document evidence, your Honor. I am trying to get them all in now.

The Government offers in evidence Government

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Exhibit 129.

MR. NAFTALIS: No objection.

XXX (Government Exhibit 129 received in evidence.)

(Mr. Feinberg read to the jury from Government Exhibit 129 in evidence.)

MR. FEINBERG: The government also offers Government Exhibit 129A.

MR. NAFTALIS: No objection.

XXX (Government Exhibit 129A received in evidence.)

(Mr. Feinberg read to the jury from Government Exhibit 129A in evidence.)

MR. FEINBERG: The government offer Government Exhibits 129C through F into evidence.

MR. NAFTALIS: Your Honor, with regard to Government Exhibits 129C, D, E, and F, I would just object, for the record, for the same reasons I raised at the side bar on those earlier exhibits.

THE COURT: Suppose counsel come up.

(At the side bar.)

THE COURT: Where is there anything on these exhibits that show that the defendant made the payments?

MR. FEINBERG: Not these exhibits, but there is evidence in the record that the defendant made all the payments for this woman. On the previous automobile exhibits

Gilbert Fisher puts his address down.

THE COURT: It does not prove he made these payments.

I will stop this very quickly.

Is there a recognition of common law marriage in New Jersey? I understand they are not married.

MR. FEINBERG: At this time they are not married.

THE COURT: Issue a subpoena for it. There is nothing here to show that he made the payments for it. You have a right to question.

MR. FEINBERG: What about the admissions he made in the divorce proceeding concerning his support of her, out of his own lips?

THE COURT: Don't argue with me. I will issue a forthwith subpoena for it.

(In open court.)

THE COURT: I sustain the objection.

MR. FEINBERG: At this time the government would offer into evidence Government Exhibit 142.

MR. NAFTALIS: No objection.

XXX

(Government Exhibit 142 received in evidence.)

(Mr. Feinberg read to the jury from Government Exhibit 142 in evidence.)

MR. NAFTALIS: I would like the jury to be in-

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structed, your Honor, that that is being offered for the same purpose, in connection with their computation, and not for any charge related to this defendant whatsoever.

THE COURT: The statement I made to you before with regard to the cost of living, this applies to this too. It is in connection with the computation, the amount that the government claims is due. It will be clear to you why it was offered when the chart is presented to you.

MR. FEINBERG: The government offers Government Exhibit 143 in evidence.

xx

(Government Exhibit 143 received in evidence.)

(Mr. Feinberg read from Government Exhibit 143 in evidence to the jury.)

MR. FEINBERG: The Government offers 130.

MR. NAFTALIS: No objection.

xx

(Government Exhibit 130 received in evidence.)

(Mr. Feinberg read from Government Exhibit 130 in evidence to the jury.)

MR. NAFTALIS: Isn't there a line through it? Whatever relevance that has, just so it is accurate.

Did you give the date of that document, Mr. Feinberg?

MR. FEINBERG: September 14, 1970 is the date of this document.

The Government offers 131.

MR. NAFTALIS: No objection.

xx

(Government Exhibit 131 received in evidence.)

(Mr. Feinberg read from Government Exhibit 131 in evidence to the jury.)

MR. FEINBERG: The Government offers in evidence 132 and 133.

MR. NAFTALIS: These are objected to, your Honor, for the same reason at our last side bar discussion.

In addition, there is reference to another person there as well.

THE COURT: I will sustain the objection.

MR. FEINBERG: The Government offers 135 in evidence.

MR. NAFTALIS: I have no objection.

xx (Government Exhibit 135 received in evidence.)

(Mr. Feinberg read from Government Exhibit 135 in evidence to the jury.)

MR.NAFTALIS: So stipulated.

MR. FEINBERG: Your Honor, at this time could we approach the side bar for one moment, please.

(At the side bar.)

MR. FEINBERG: Your Honor, here is the situation now. Subject to calling by subpoena Mrs. Duncan, there are three or four documents that Mr. Naftalis wants to discuss with me at lunch concerning a stipulation.

Then the only persons left to be called this afternoon will be Spadola with the charts and one or other witness. We may call the maid. She will be here this afternoon. That is it.

The problem is we are going to issue a subpoena for this woman. We will issue it, but I don't know if we can get her here at three or three-thirty.

THE COURT: Whatever time you can get her in here --

MR. FEINBERG: Your Honor, may I be heard for one minute on this?

It seems to me, your Honor, I might be wrong on this, that there is enough testimony and documentary evidence both in this case to at least make it a jury question as to the source of Mrs. Duncan's expenditures, for example, with regard to this house, the apartment at 470 Lenox Avenue.

For example, not only does Mr. Fisher state that that is his residence, 470 Lenox --

THE COURT: It doesn't follow that he paid the rent for it.

MR. FEINBERG: Your Honor, he does state in the divorce proceeding that he supports the two children and that Clara Bernice Duncan works for him in the gambling operation.

In addition--

THE COURT: That she worked for him?

MR. FEINBERG: Right.

In addition, your Honor, we have put in evidence to show that Mrs. Duncan had no independent--

THE COURT: That is the point. Show me where there is any evidence that she has an independent income or you have excluded that she has an independent income.

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The staement in the divorce proceeding is not as broad as you stated it. Look at it during the lunch hour.

Don't spend time. You will keep on arguing it and it is a very easy way to handle it.

MR.FEINBERG: If we can find her. I am worrying about the Court's time.

THE COURT: Don't worry about the Court's time. If need be, we will go over until tomorrow morning to bring her here.

MR. FEINBERG: At this time, we will break for lunch.

THE COURT: Yes.

(In open court.)

THE COURT: Members of the jury, we will take our luncheon recess now. I am about to hear another matter that may take me about 45 minutes or so, at least the lawyers said that is how long they would like. Sometimes lawyers take longer than they suggest in matters so instead of recessing until two o'clock- so I can have a few minuates for lunch, we will recess until 2:15.

(Luncheon recess.)

AFTERNOON SESSION - 2:15 p. m.

(Jury in box.)

THE COURT: You may proceed.

MR. FEINBERG: There are a few stipulations that I would like to offer at this time.

It is stipulated by and between the government and Mr. Naftalis for the defense --

THE COURT: May I explain to the jury that a stipulation is an agreement between counsel in this case with the consent of the defendant that in certain matters represented, either by way of testimony or documents, this would be the effect of it, and instead of calling the witnesses the stipulation is entered.

MR. FEINBERG: Thank you, your Honor.

It is stipulated by and between the government and Mr. Naftalis that on or about October 9, 1970 Mr. Fisher, Jr. made a cash expenditure of $10,000.

MR. NAFTALIS: Your Honor, if you recall, certain exhibits Mr. Feinberg offered, Exhibits 129C through F and 132 and 133 for identification, I objected and your Honor had sustained the objection. Mr. Feinberg and I have entered into certain stipulations over lunch and I have agreed to withdraw my objection to the documents and consent to their receipt.

MR. FEINBERG: The government reoffers Exhibits

129 C, D, E, and F.

(Government Exhibits 129 C, D, E, and F received in evidence.)

X XX

(Mr. Feinberg read from Government Exhibits 129 C, D, E, and F in evidence.)

MR. FEINBERG: The government reoffers Exhibits 132 and 133 in evidence.

MR. NAFTALIS: No objection.

(Government Exhibits 132, 133 received in evidence.)

XXX

(Mr. Feinberg read to the jury from Government Exhibits 132, and 133 in evidence.)

MR. FEINBERG: Your Honor, also it is stipulated by and between the government and Mr. Naftalis that Gilbert Fisher, Sr. applied for medical assistance, Medicaid, in 1968, and that Lulu Fisher applied for Medicaid, in 1968, and that Lulu Fisher applied for Medicaid, medical assistance, in 1970.

MR. NAFTALIS: Right. It is so stipulated.

MR. FEINBERG: One moment, if your Honor please.

(Pause.)

MR. FEINBERG: Your Honor, the government calls to the witness stand Sara Darlington.

S A R A D A R L I N G T O N, called as a witness on behalf of the government, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FEINBERG:

Q Miss or Mrs.?

A Mrs.

Q Mrs. Darlington, you are going to have to speak up very loudly because the reporter won't even be able to hear you otherwise.

A Yes, sir.

Q Speak that way, towards the jury.

A Okay.

Q Mrs. Darlington, directing your attention to around March of 1970, how were you employed at that time?

A I used to do a Monday job with Mrs. Fisher, a day job on Mondays for Mrs. Fisher.

Q What is Mrs. Fisher's first name?

A Bernice.

Q Where did you do this Monday job for Mrs. Fisher?

A In her home.

Q Where is her home?

A I don't remember the number. I think it is 461 North Woodland Street.

Q In what city is that?

A Jersey.

Q New Jersey?

A Yes.

Q What did you do, Mrs. Darlington? Explain to the Court and jury what your job was?

A General cleaning, housework. Do washing and things and make dinners for the kids.

Q Did you come to the house? Is that it?

A Yes, sir.

Q When you got to the house, who was present in the house when you were there?

A Mrs. Fisher would be there, the kids, and they go off to school and Mr. Fisher would be about leaving.

Q Do you see Mr. Fisher in this courtroom?

A Yes, sir. He is sitting at the corner beside you.

MR. NAFTALIS: Identification conceded.

Q When you were at the house, Mrs. Darlington, did you ever see Lulu Fisher?

A No, sir. I don't know her.

Q Did you ever see Gilbert Fisher, Sr.?

A No, sir.

Q When you were at the house, Mrs. Darlington, did you ever note, observe, anything in the driveway?

A Well, the Fisher car would be in the driveway, sir.

Q What type of car? Do you recall? If you remember.

A Well, I really don't remember the type of car, but sometime a station wagon would be in the driveway, or the cars that park in his garage.

Q How many cars did you see at any one given time?

A Two would be in the garage and two in the driveway, if he is at home, before he left.

Q If Mr. Fisher was at home?

A Yes, sir.

Q Mrs. Darlington, in the course of your cleaning did you observe anything?

A Well, I would be cleaning from corner to corner, turning over drawers, and I would see money there, and I would see money lying in the drawer, and I would draw Mrs. Fisher's attention to it.

Q Where did you see this money in the drawer? Where were the drawers?

A In the kitchen, or putting away clothes in her bedroom.

Q How much money would you see, to the best of your recollection?

A Well, I could not say, but it was a good amount of money. I cannot say. I didn't count it.

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Q Was it bills, change, or what?

A In bills.

Q What were the demoninations of the bills? Do you recall?

A 10's and 20's.

Q Was the money stacked or clipped together? What form did it take?

A Well, it would be in a bundle in the kitchen drawer.

Q Would there be an elastic band or something around it?

A I think there was an elastic band. I'm not quite sure.

Q Can you show the Court and jury how much there was stacked? Was it this much or this much (indicating)? How much? Indicate with your hand.

A It would be bills about that (indicating).

Q That would be in the various drawers?

A Not various. In the kitchen drawer or in the bedroom drawer.

Q In those drawers?

A Yes.

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Q Did you tell Bernice Fisher about this money?

A Yes, I told her I was cleaning the drawer and I saw the money there.

She accused me of taking some sometime ago, too.

Q Now, did you see this money, Mrs. Darlington, on one occasion, one Monday or on different Mondays?

A Well, to be honest, money was always lying around there. It was not my business, but I was cleaning and there was some money there.

MR. FEINBERG: No further questions.

CROSS-EXAMINATION

BY MR. NAFTALIS:

Q Mrs. Darlington, you testified that you worked in 1970, is that correct?

A Yes, sir.

Q You worked there for how long a period of time?

A I would say either five or six months on Mondays.

Q In other words, you worked some time from March of 1970 up through the summer?

A Yes, sir.

Q Yousaid in one or two drawers, is that it, in the kitchen or in another room you saw some money?

A Yes.

Q You said it was tens and twenties about this high

(indiating) something like that you said?

A I didn't put it like that. To be honest, sir, I don't remember, but it was a good amount of money. I didn't count it because I was cleaning, but I saw it there.

Q You indicated that-- how many cars did you say that they had there?

A Two in the garage and if Mr. Fisher was at home, there would be four cars there. Always three or four cars,at times three.

Q Or three?

A Yes, if Mr. Fisher was not at home, there would be but three cars there.

Q Didn't you first say there would be two cars there, but if Mr. Fisher were home, then there would be four cars there?

A I said there would be two cars in the garage and two in the driveway; if Mr. Fisher is there, there would be tow cars in the driveway and two cars in the garage.

Q So when he came there were two additional cars when he came or am I confused?

Will you explain that to me?. I don't understand.

THE COURT: You will have to answer it for yourself, don't you.

Q You indicated, did you not, during these few

months that you worked for them, that you found this money that you told Mrs. Fisher about, is that correct?

A Yes, I did.

Q And then there came a time, you have indicated, that she indicated to you that she thought that you were taking money from the house, is that right?

A She didn't thought that. She told me that. I don't remember the figure, either four or five hundred in one place, and she said it was missing. She accused me of taking it.

Q And so Mrs. Fisher told you that there was four or five hundred dollars missing?

A Yes.

Q And it was missing after the day you cleaned, is that right?

A Yes, sir.

Q And she accused you of taking the four or five hundred dollars that was missing when you were there?

A Yes, sir.

Q And she fired you, is that right?

A Well, she didn't fire me. I didn't want to go back.

Q She told you she didn't want you to work there any more after she accused you of taking the money, is that

right?

A I think so, sir.

MR. NAFTALIS: Nothing else.

MR. FEINBERG: I have no questions.

THE COURT: All right, Mrs. Darlington, you are excused.

THE WITNESS: Yes, sir.

(Witness excused.)

MR. FEINBERG: Your Honor, at this time the Government will call Special Agent Spadola, our final witness.

MR. NAFTALIS: Your Honor, could we approach the bench on one item of Mr. Spadola's testimony?

THE COURT: Yes.

(At the side bar.)

MR. NAFTALIS: Your Honor, Mr. Feinberg was kind enough to show me the charts a few minutes ago before lunch or at the end of the lunch hour, and I do have an objection to the captioning of the charts in their present form.

First, with regard to this one, there is one chart, I don't know the number of it, this is a small copy of it, it talks about "Alleged taxable income," it is captioned at the top "USA v. Gilbert Fisher, Summary of alleged taxable income and tax liability."

I object to that captioning of the chart.

What this chart really purports to show is taxable income and taxale liability, 1967 through 1970, on joint income tax returns filed on behalf of Rosalie and Gilbert Fisher, I don't mean necessarily in that order, as filed and as corrected, as opposed to just Gilbert Fisher.

THE COURT: Why don't you take out "USA v. Gilbert Fisher"?

Is there any problem on that?

MR. FEINBERG: I have no objection to that. I took your Honor's advice and I have copies for everybody. I will have to mark it out on everybody's copy.

THE COURT: You should have cleared it with him first, that is all.

MR. NAFTALIS: The same objection applies to the other charts.

MR. FEINBERG: For every one we will have to do it. It shouldn't take more than five minutes. We might be able to get well into the direct before I have to do it or I will do it whenever your Honor wants it done.

THE COURT: Why don't you start and when you are ready to put the chart in, make the correction at that time.

MR. NAFTALIS: Thank you, your Honor.

(In open court.)

MR. FEINBERG: The Government calls John Spadola.

...

J O H N S P A D O L A, called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FEINBERG:

Q How are you employed, sir?

A I am an Internal Revenue Agent with the Internal Revenue Service in the Manhattan District, Audit Division.

Q How long have you been so employed?

A Seven years.

Q What did you do before that, sir?

A Before that I was an accountant and tax-- worked in accounting and taxes for a city investment company for approximately ten years and five years before that I was employed in the same work.

Q Agent Spadola, what is the function of a revenue agent?

A The primary function of a revenue agent is when a tax return is assigned to him to determine the correct

taxable income and the correct taxable liability of the return.

Q Did you conduct-- is that called an audit, sir?

A Yes, sir.

Q Did you conduct such an audit investigation with respect to Gilbert Fisher, Jr.?

A I did. I was assigned as a cooperating revenue agent to the Intelligence Division and assigned to a special agent who had the case.

Q When did this audit investigation commence?

A It commenced in May, May 11, 1972, I believe.

Q Was this investigation conducted with respect to the joint income tax returns filed by Gilbert and Rosalie Fisher?

A It covered the years, the joint returns for the years 1967, 1968, 1969 and 1970.

It also covered amended-- single returns filed by Gilbert Fisher in 1970 and a single amended return filed by Rosalie Fisher in 1970.

Q Now, Agent Spadola, in connection with this audit and investigation and based on the exhibits that have been admitted into evidence in this trial, have you had an opportunity to examine and analyze those exhibits, first of all?

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A Yes, I have.

Q After you analyzed those exhibits, what did you do with them?

A After the exhibits were analyzed, the special agents and I made various schedules out like the various expenditures and sources of income.

Q Are these schedules that you have prepared based on a method called the specific expenditures method?

A It is.

Q Will you explain to the members of the jury what the specific expenditures method of tax analysis is ?

A Well, simply, when a taxpayer expends more than is reported income and he cannot evidence that by non-taxable sources or cannot satisfactorily explain why the excess spending, then we deduce from that that this is unreported income.

Q Thatwhat is unreported income?

A The expenditures. Well, to put it simply: You take the taxpayer's expenditures for a given year over his reported income. We allow him various credits for any non-taxable sources.

If the balance of expenditures cannot satisfactorily be explained by the taxpayer as to where he got that money or where the source came from, we deduce that this is

unreported income.

Q Agent Spadola, can you explain to the jury also under what circumstances, such a method is used by you?

A Well, normally that method is used when there is a cash basis taxpayer or it's the type of business that doesn't lend itself to keeping detailed records.

Then we use this method.

What we do is we document all expenditures that can be attributed to the taxpayer as having been spent by him. Allow him any non-taxable sources of income. Allow him the reported income. Whatever is left is deemed to be unreported income unless it can be explained.

MR. FEINBERG: Your Honor, at this time could wehave a short recess because of the matters we discussed at the side bar.

THE COURT: All right.

There are some matters to be taken up and I think it will save time if we have the recess now. It is a little earlier than usual, but we will take our mid-afternoon recess now.

(Recess.)

P.M.

T-[illegible]1

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(Jury in box.)

THE COURT: You may proceed.

MR. FEINBERG: May this be marked as Government Exhibit 144.

(Government Exhibit 144 marked for identification.)

BY MR. FEINBERG:

Q Agent Spadola, I show you Government Exhibit 144 and ask you if you can identify that, sir?

A Yes.

Q What is that?

A This is a composite chart made of the expenditures, the specific cash expenditures method of determining income.

Q For what year?

A 1967.

Q For whom?

A For Gilbert and Rosalie Fisher.

Q Did you make this chart, sir?

A Yes, I did.

Q Did you make this chart on the exhibits that are in evidence in this case?

A I did.

MR. FEINBERG: Your Honor, at this time the government would offer Exhibit 144 in evidence as an aid memoir.

THE COURT: Members of the jury, I should explain

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this to you now: I made a suggestion before that you would understand some exhibits later that were being offered which, upon their face, didn't appear to be quite clear at the time. This witness is an expert. He is about to explain the government's theory in support of its claim that the defendant in each taxable year had additional income and also an additional amount of taxes based on that claim of additional income. His testimony would be based upon exhibits that are already in evidence. Upon those exhibits he will testify and give his opinion, but, essentially, the ultimate question is to whether or not in fact the defendant did have additional income in this year, sufficient evidence upon which to draw an inference of such additional income and the amount of the income, if any, owing to that additional income, will be a fact determination made by you.

This exhibit, of course, is offered, as counsel referred to it, as an aid memoir. It is not expected that you will be able to keep in mind the various figures, the various exhibits. That's another reason the chart is prepared based on the evidence.

The ultimate fact question in this case will be decided by you.

MR. FEINBERG: Thank you, your Honor.

(Government Exhibit 144 received in evidence.)

XXX

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MR. FEINBERG: Your Honor, at this time, may I distribute copies of this chart to the members of the jury?

THE COURT: Yes. It will be easier for the jury to follow.

(Pause.)

MR. FEINBERG: Also, your Honor, may Agent Spadola be allowed to come down from the witness stand.

THE COURT: Yes.

Q Agent Spadola, using this chart as an aid -- and all members ofthe jury have copies of this chart in front of them -- would you first, again, explain to the members of the jury what the specific expenditures method of analysis is?

MR. NAFTALIS: Objection. It has been asked and answered.

THE COURT: I will allow him to answer that. We had an unnecessary recess. I will allow it.

A The specific cash expenditures method is to total all the alleged expenses and sources of income, allow the taxpayer credits for any non-taxable sources; also allow the taxpayer credit for any income reported on the return. The resulting balance we deduce is an alleged increase in taxable income. This chart is for the year 1967.

Q Explain the specific items on this chart to the jury and the court.

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A This is money allegedly spent or applied by the taxpayer. The first item is cash in bank, $4038.22. This is an increase.

Q When you say that this is an increase, what do you mean by that?

A What we do, we total, we take, all the bank accounts thatthe taxpayer has, savings and checking, at the first day of 1967, the year we are working with. Then we take all the bank balances at the end of the year 1967, December 31. If there is an increase in those bank balances we charge the taxpayer with that increase. Conversely, if there is a decrease, he is allowed credit. In this case there was an increase of $4038.22 in the taxpayers' bank balances.

Q Continue, please.

A The next item is purchase of land and the home construction, $82,810. This represented principally the purchase of land in Englewood, New Jersey, construction of the home, a pool, and a basement, and various sundry small items, making up the $82,810.

Q Continue.

A The next item is purchase of automobiles, 1967; we charged $1998.75.

Q Explain to the jury, please, how you get that small amount, $1998.75, for the purchase of automobiles.

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A The small amount is due to trade in value. The taxpayer traded in one car and we only charged the net cost. We only charged what was expended by the taxpayer. Any credits that he is allowed for the trade in we do not charge.

The next item is cost of living, residence, Englewood, New Jersey. This represents estimated costs that were given by the Community Council of New York: Real estate taxes, gas and electric, and sundry items such as that.

3-2 The next item is medical expenses, $763.90, which is doctors and dentists medical expense.

The next item is miscellaneous expense, $2338.80 which represents rents on the apartment at 2100 Madison Avenue, telephone, purchase of books, small household items, all to make up the total of $2338.80.

The next item is loans and repayments, $4539.50. This represented principal payment on two rooming houses owned by Gilbert and Rosalie Fisher.

The resulting total is expenditures of $104,473.67.

Q Then what did you do after you had that total?

A Now we allow the taxpayer credits.

Loans from individuals, $3,000. This was a loan from Anna Snype, Rosalie's mother. Insurance dividend of $70.80. This was from the Veterans' policy, the GI policy.

We allowed the taxpayer cash on hand of $1,000.

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This is an estimated figure assuming he had roughly $1,000 in his possession or in his home.

Q Is that $1,000 based on any exhibit in evidence.

A It is not. It is an arbitrary figure. We allowed that to the taxpayer.

Q As a credit at this time?

A Yes.

We furthergave the credit for wages unreported and allowed that as a credit of $7670. This was income from the Esplanade Garage, which was received but never reported as income, but we allowed it as a credit.

THE COURT: Why do you allow that as a credit?

THE WITNESS: Because he had the funds to spend.

THE COURT: I see. Whether or not it was reported?

THE WITNESS: It was not reported. The funds were there to be expended.

A (Continuing) The total of the credits, $10,740.80.

We deducted the credits from the money allegedly spent or applied and we had an adjusted gross income of $93,732.87.

From this we allowed the taxpayer the itemized deductions claimed on his return in full, $3810.36. The taxpayer was allowed four exemptions for himself, his wife, and two children. The total is $6210.36.

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The corrected taxable income would be $6210.36 deducted from the adjusted gross income of $93,732.87, resulting in the corrected taxable income of $87,522.51.

From this the taxpayer is alloyed a credit for the taxable income reported on his tax return. The resulting increase is $86,791.37, as the alleged increase in taxable income for the year 1967.

Q After you reached this figure of $86,791.37, what did you do then?

A Then the taxes is computed on that amount.

Q How did you go about computing the tax?

A By taking the tax tables for joint rates for the year 1967 and computing them, based on the tables in the Internal Revenue Code.

Q I show you Government Exhibit 141 marked for identification and ask you if you can identify that.

A Yes.

Q What is that?

A This was the computation of taxes that I made for the years 1967, 1968, 1969, and 1970.

Q As to the year 1967, after you computed the tax, what was your conclusion?

A I concluded that there was a large deficiency in tax.

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Q What was that deficiency?

A The deficiency was $36,600.70. We arrived at that by taking the corrected taxable income and applying the tax at joint rates, which came to $37,703.06.

There was no surtax in the year 1967. The tax paid on the return was $102.36. The deficiency of income tax was $36,600.70.

MR. FEINBERG: I ask that this be marked as Government Exhibit 145.

XXX (Government Exhibit 145 marked for identification.)

Q Agent, I show you Government Exhibit 145 and ask you if you can identify this chart?

A Yes. This was a chart that I made for the year 1968 under the cash expenditures method.

Q Was this chart prepared by you?

A Yes, it was.

Q And it was prepared on the basis of the exhibits in evidence in this case?

A Yes, it was.

Q It was prepared the same way as the chart in 1967?

A It was.

MR. FEINBERG: The government will offer 145 in evidence.

MR. NAFTALIS: I have no objection subject to the

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Court's instruction that this chart is not evidence but merely the government's contentions.

THE COURT: Same instruction.

XXX (Government Exhibit 145 is received in evidence.)

THE COURT: Counsel didn't ask you one question on that prior exhibit. I take it on the one you are about to discuss, you have shown along the various items the different exhibits in evidence upon which you rely in computing those figures?

THE WITNESS: Yes.

MR. FEINBERG: May I again distribute copies to the jury, your Honor? These are the copies for the chart for 1963.

(Pause.)

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Q Agent Spadola, could you explain the chart for 1968 as you did for 1967?

A As in 1967, this is a chart for alleged expenditures and sources of income for Gilbert and Rosalie Fisher; money allegedly spent or applied by the taxpayer.

Again we have the cash in bank. This year there was an increase of $7,915.15. We applied the same formula. Increase in balance from January 1, 1968 to December 31, 1968.

The second item is purchase of land and home construction, $3,782.10, which was principally furniture and decorating for the home and some pool expenses.

Purchase of automobiles. $7,536.62. This was the purchase of two automobiles.

Cost of living, residence, Englewood, New Jersey, $11,385.84, represents the cost of living from the Community Council, real estate taxes, gas and electric and other items.

Medical expenses of $780.90, main doctors and dentists.

Miscellaneous expenses, $3,372.28 represents principally the expenses on the apartment at 2190 Madison Avenue, telephone, rent, purchase of books, payment of taxes, sundry items.

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co:mg 2 Spadola-direct

Loans and repayments, $2,839.47 is again repayments of principal on two rooming houses that were owned by the Fishers.

The total is $37,532.36.

From this we allowed various credits.

Loans from individuals, again a loan from Anna Snype, $2,000. Insurance dividends from the VA, $61.20. Total credits, $2,061.20.

We subtract this from the money allegedly spent or applied and we have an adjusted gross income of $35,471.16.

Again we allow the itemized deductions on the return, $3,796.97. Four exemptions, $2400, totaling $6,196.97.

Subtracting this from the adjusted gross income we have $29,274.19.

This is deemed to be the corrected taxable income.

We allowed the taxpayer credit for reporting income reported on the return, $8,714.67. The alleged increase in taxalbe income, $20,559.52.

Q Now,after you reach this figure for year 1968, what did you do then?

A Then we computed the tax.

We took the corrected taxable income $29,274.19.

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Again, we applied the joint rates. The tax is $7,596.93.

The surcharge in 1968 was $569.77.

The total tax $8,166.70.

The taxpayer paid with his return $1,540.01. The deficiency of income tax for the year of 1968 was $6,626.69.

Q And these numbers over here on the right of the chart, are those the exhibits?

A These represent the exhibits evidencing those numbers.

Q Thank you.

MR. FEINBERG: May this be marked Government's Exhibit 146.

xx (Government's Exhibit 146 marked for identification.)

Q Agent Spadola, I show you Government Exhibit 146 and ask if you can identify this.

A Yes. This is a chart I made for the year 1969 on alleged expenditures and sources of income of Gilbert and Rosalie Fisher.

Q Did you make this chart on the basis of the exhibits in evidence in this case?

A I did.

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MR. FEINBERG: The Government would offer 146 in evidence as an aide memoire.

MR. NAFTALIS: No objection,subject--I assume it is received in precisely the same way.

THE COURT: Yes.

xx (Government's Exhibit 146 received in evidence.)

Q Agent Spadola, can you explain this chart, please?

A This is for the year 1969, alleged expenditures and sources of income for Gilbert and Rosalie Fisher.

Once again, we take the money allegedly spent or applied by the taxpayer.

The cash in bank in 1969, there was an increase of $20,940.77 in the bank accounts.

The second item was purchase of land and home construction, $3,000.

This represented furniture and decorating expenses.

Purchase of automobiles, $10,272.87.

This represented several purchases of cars,two cars.

Investments, $3600. This had to do with the Bernice Variety Store.

Cost of living residence Englewood,New Jersey, $13,315.59. Again, this was the Community Council of New

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York figures plus real estate taxes, gas and electric and small sundry household items.

Medical expenes, $129.60 for doctors and dentists.

Miscellaneous expenses, $6,959.02.

Again, this was the rent on the apartment at 2190 Madison Avenue. It represented expenditures for telephone, for insurance, life insurance, purchases of some books and payments of taxes and some loans.

That represented that total.

Loans and repayments, $2,999.84 is again principal payments on two rooming houses owned by Gilbert and Rosalie Fisher.

The total for 1969 was $61,217.69.

From that we allowed various credits. One, loans from individuals, $3,000. Again a loan from Anna Snype.

Insurance dividends, Veterans Administration dividend $61.20, totaling $3,061.20.

We subtract that from the total of money allegedly spent and we receive an adjusted gross income of $58,156.49.

We allowed the taxpayer the itemized deductions form his return of $4,924.82. Four exemptions, $2400, totalling $7,324.82.

We subtract this from the adjusted gross income and we get the corrected taxable income $50,831.67.

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We reduce that by the taxpayer's taxable income reported on his return, $5,618.94.

The difference, $45,212.73 is the alleged increase in taxable income in 1969.

Q What did you do after that?

A Then we followed the same procedure. We took the corrected taxable income of $50,831.67, applied the joint rates. The tax was $17,475.84.

The surcharge in 1969 was 10% of the tax which was $1747.58.

The total tax, $19,223.42.

The taxpayer was allowed credit for taxes paid on his return of $1,110.36.

The deficiency of tax, $18,113.06 for 1969.

Q And these figures over here represent exhibits in evidence, is that correct?

A Yes, they do.

MR. FEINBERG: May this be marked Government Exhibit 147, please.

xx (Government Exhibit 147 marked for identification.)

Q Agent Spadola, can you identify Government Exhibit 147?

A This is a chart prepared for the year 1970 for

alleged expenditures and sources of income for Gilbert and Rosalie Fisher.

Q Did you prepare this chart?

A I did.

Q Based on the exhibits in evidence?

A I did.

MR. FEINBERG: The Government offers 147 in evidence.

MR. NAFTALIS: No objection.

xx (Government's Exhibit 147 received in evidence.)

Q Agent Spadola, could you explain this chart,147, for the year 1970?

A This is again a chart for 1970 for alleged expenditures and sources of income for Gilbert and Rosalie Fisher.

The first item, cash in bank, there is a decrease of $43,081.53.

When the balances were taken at the end of the year, the taxpayer had withdrawn $43,081 more out of his account than he had started with so conversely we allowed him a credit.

Q Now, is the great amount of this withdrawal figured out here in the chart?

A Yes, it is.

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Q What is that?

A That would be in the cash on hand, and I will explain that when I get there.

Q Fine.

A The second item was Purchase of land and home construction, $1500, which was for furniture and decorating.

Purchase of automobiles, $13,755.45 for purchase of several automobiles, including a Jaguar and I believe a Cadillac.

Investments, $34,044.32. This represented moneys invested in a vvaiety store called Bernice's Discount.

Cost of living, residence, Englewood, New Jersey, $17,815.69, represented by Community Council cost of living figures plus real estate taxes of more than $4,000, gas and electric and small sundry items.

Medical expenses, $665.70, doctors and dentists again.

Miscellaneous expenses, $17,629.31. The bulk of that, about $10,000, represents the bail bond.

MR. NAFTALIS: Your Honor, I have an application. Should I approach the bench?

THE COURT: Yes.

(At the side bar.)

MR. NAFTALIS: Your Honor, I have a motion to make

for a mistrial now.

Mr. Feinberg and I stipulated as to the amount of the $10,000 expenditure specifically omitting any reference to bail bonds.

You remember in the first trial there was some testimony about a guy named Sergio Palankey.

In any event, your Honor, the defense in this case has taken great pains in its arguments to the Court and in its arguments with Mr. Feinberg to exclude all references to anything which would hint that this man has ever had any criminal record or been brought up on any charges or anything of the sort.

If your Honor recalls the strenuous argument I made which your Honor very kindly went along with, about the FBI locking him up, which you specifically redacted from the transcript, Government Exhibit 68A - this bail bond matter related to it and it is a matter which is not in evidence.

I regard it as highly prejudicial and I think that Mr. Feinberg's agent should have well known the fact that that was not a matter of evidence in this case.

That evidence is not in evidence in the first place and it seems to me this man has worked closely with Mr. Feinberg throughout the whole trial and should have

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anybody with your experience thinks that this statement apparently, which is an inadvertent slip, should be the basis of a mistrial.

It had no meaning to me. If you think it had a meaning to the jury, I am prepared to give any instruction you want me to give to the jury. You tell me the instruction you want me to give the jury and I will follow it word-for-word.

MR. NAFTALIS: Might I think about this for a few seconds?

THE COURT: Yes, you may.

MR. NAFTALIS: I know, your Honor, sometimes the medicine is worse than the disease.

THE COURT: That is not so. I am just saying to you and I am repeating it, I am flabbergasted by your motion. I give you whatever time you require to think about it and I will take your request and whatever it is, I will follow it explicitly. As they used to say, verbatim."

MR. NAFTALIS: I don't have any suggestion -- if Mr. Feinberg would consult with his witness and just instruct him not to refer to that any more in his testimony.

MR. FEINBERG: He won't.

(In open court.)

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BY MR. FEINBERG:

Q Agent Spadola, would you continue?

MR. NAFTALIS: I thought I was being given a few minutes to consider this other matter.

MR. FEINBERG: I'm sorry, I apologize.

(Pause.)

(At the side bar.)

MR. NAFTALIS: I have decided I think your Honor is right that it is better to leave things the way they are. I think that I would only unduly highlight it now and I don't think an instruction would be of any significance.

Thank you.

(In open court.)

BY MR. FEINBERG:

Q Go to the next item.

A The next item was loans and repayments, $2,195.23. This was principal payments on two rooming houses owned by Gilbert and Rosalie Fisher.

The next item is cash on hand, $30,000.

This represented withdrawal from New York Bank for Savings of two cashiers checks in the amount of $19,500 each in October of 1970.

We allowed the taxpayer credit of $5,495.43, which

represented expenditures from the date of that withdrawal to the end of the year 1970.

Q Let me interrupt here for one moment.

I show you Government Exhibit 140 marked for identification and ask if you can identify that.

A Yes, I prepared this.

Q What is that, sir?

A This is the detail of expenditures for the period October 15, 1970 through 12-31-70.

Q Does that computation reflect credits given from this withdrawal of $39,000?

A Yes. The total here is $5,495.43, which we allowed as a credit against the withdrawal of $39,000, charging the taxpayer with $33,504.57.

Q Continue.

A The total is $78,028.74.

Against that we allowed the taxpayer insurance dividends credit from the Veterans Administration of $66.

Unreported wages of $1,170. Taxable income reported $4,802.71 on a single return. Married, but filing separately, total of $6,038.71. Subtracting this from the $78,028.74, we have adjusted gross income of $71,990.03.

Itemized deductions on the return, $5,527.98 plus the exemptions, four exemptions, $2500; credits allowed

$8,027.98.

Subtracting this from the adjusted gross income, the corrected taxable income was $63,962.05.

We now allowed the taxpayer credit for taxable income reported in 1970, $725.52, resulting in alleged increase in taxable income of $63,236.53.

Q After you reached this bottom line figure, what did you do then, Agent Spadola?

A Then we compute the tax. We go back to the corrected taxable income of $63,962.05. Applying joint rates, the tax is $24.399.89. The surtax in 1970 was two and a half percent, resulting in an amount $610.

Totalling the two, $29,009.09. Allowed the taxpayer credit for what he paid on his return, $101.57. Deficiency in 1970, $24,908.32.

Q These are the exhibit numbers in this case?

A They are.

Q Agent Spadola, did you make a final summary chart, summarizing the alleged taxable liability that you have discussed today?

A Yes, I did.

MR. FEINBERG: May this be marked Government Exhibit 148.

(Government Exhibit 148 marked for identification.)

xx

Q I show you Government Exhibit 148 for identification and ask if you can recognize it.

A I do.

Q What is this?

A This is a summary of the alleged taxable income and tax liability for Gilbert and Rosalie Fisher for the years 1967, 1968, 1969 and 1970.

Q Did you prepare this chart?

A I did.

Q On the basis of the four previous charts?

A Yes, I did.

MR. FEINBERG: The Government offers 148 in evidence.

MR. NAFTALIS: No objection.

I assume it is accepted --

THE COURT: The same instruction.

(Government Exhibit 148 received in evidence.)

xx

Q Agent Spadola, could you explain this chart, please?

A This is a summary of alleged taxable income and tax liability for the years 1967, 1968, 1969 and 1970 for Gilbert and Rosalie Fisher.

On the top half of the chart we have the alleged taxable income.

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For the year 1967, the income reported per return was $731.14.

The corrected income was $87,522.51.

The increase in income $86,791.37.

In 1968, reported income per return, $8,714.67.

Corrected $29,27419.

Increase in income $20,559.52.

1969, reported per return, $5,618.94.

Corrected $50,831.67.

Increase in income, $45,212.73.

1970, reported on the return, taxable income, $725.52.

Corrected taxable income, $63,962.05.

Increase in taxable income, $63,236.53.

The lower half of the chart,we have the alleged tax liability based on the figures above.

In 1967, taxes paid per return was $102.36.

Corrected taxes, $37,703.06.

The deficiency in taxes, $37,600.70.

1968, paid per return, $1,540.01.

Corrected, $8,166.70.

Deficiency in tax, $6,626.69.

1969, paid per return, $1,110.36.

Corrected, $19,223.42.

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Deficiency, $18,113.06.

In 1970, paid per return, $101.57.

Corrected, $25,009.

Deficiency, $24,908.32.

MR. FEINBERG: I have no further questions of this witness.

MR. NAFTALIS: Would you put 1967 back up?

MR. FEINBERG: Sure.

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CROSS-EXAMINATION

BY MR. NAFTALIS:

Q Mr. Spadola, these charts, I think you have indicated these charts were prepared based upon exhibits that are in evidence in this case; is that correct?

A Yes. That's correct.

Q I think you have indicated in response to that, in response to the question of his Honor, that you listed the exhibits in a right-hand column, as I look at the chart, and in a right-hand column as the jury looks at the chart.

Did you take into account the making of this chart any of the testimony that was given by the live witnesses who have testified here the last three days?

A I'm not sure I quite understand you.

Q Let me see if I can do it a different way.

Were you present in the courtroom at any time to hear the testimony of any witness that appeared here to testify?

A No, I was not.

Q When those gentlemen with the little machines made up the transcript at the end of the day, did you read the testimony of any of the witnesses who testified these last three days?

A At this point I have not.

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Q So, therefore, this aid memoir is based solely upon the exhibits in evidence?

MR.FEINBERG: I will object to that. I will object to that conclusion.

MR. NAFTALIS: That's what he testified to.

MR. FEINBERG: It is a conclusion that Mr. Naftalis is stating here.

THE COURT: He may ask what the basis is.

Q These charts that you made are based solely on the exhibits in evidence; is that correct?

A That's right, sir.

Q And your interpretation of the exhibits?

A Yes.

Q And in that connection I take it you must have looked at every exhibit that is in evidence here?

A At one time or another I have seen them, yes.

Q You have looked at the exhibits and made up charts in conformance with the expenditures theory?

A That's correct.

Q And you have set up this chart in support of the government's expenditures theory in this case; is that right?

A Yes.

Q I take it the basis of that theory is you look at a fellow and you see whether or not he spends a certain amount

of money; is that correct?

A Yes.

Q In this case, you are looking at Gilbert and Rosalie Fisher, and then if you feel that it can't be explained you therefore make it income for that year; is that correct? If you can't explain it to some non-taxable source that year you charge it as taxable income for that year.

A Theoretically that's what happens.

Q That's what the theory is all about?

A It is more involved than that, but, basically, that's what it is. It is a simple concept.

Q I take it that in talking about 1967, for example, in doing an expenditures analysis it is perfectly appropriate and proper for you to take into account prior accumulations of money? Is that right?

A If there are any, yes.

Q Because if there are prior accumulations of money, they can provide a non-taxable source for the expenditures that were made in this taxable year; is that correct?

A They can be a source if they are spent.

Q So, for example, on this chart you list expenditures right here at the top?

A Yes.

Q You may come down from the witness stand. Would it

be easier for you?

(Pause.)

I take it what you did here, starting in '67, was you took a bunch of expenditures which you attributed to the taxpayers, Gilbert and Rosalie Fisher?

A Yes.

T-5-2 Q You listed them: you totalled them up; is that right?

A Correct.

Q Then you listed down here sources of income basically?

A Yes. Credits.

Q Credits include sources of income?

A Yes.

Q What you did in your final analysis was to subtract the source of income from the expenditures?

A Correct.

Q And the differentiation, under your theory, the government's theory, you attribute it as the 1967 income?

A Right.

Q Under the second group of things, so-called credits, if there were prior accumulations of money it would be appropriate to list that as a credit; is that correct?

A That would not be a credit per se. It would depend

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on what we are talking about, what form it is in.

Are you speaking of money that would be in a bank? Someone's vault?

Q Let's make it more practical. You have a figure of cash on hand, $1,000.

A Yes.

Q You have used that figure of cash on hand, $1,000, to reduce the amount of expenditures?

A This was money in the pocket or in the home.

Q So, for example, if you had cash on hand instead of $1,000 to subtract from this $104,000, if you had cash on hand of $104,000, you would have a zero at the bottom?

A Yes.

Q There would be no taxable income?

A Right.

Q I take it that you know, or it had come to your attention, in connection with this case, that Mr. Fisher from the year at least beginning 1960 has been involved in gambling; is that correct?

A Yes.

Q I think as a matter of fact that's a line of work in which cash is a vehicle which is used very extensively?

A Yes.

Q I take it that as somebody who is involved in

gambling he has a fair amount of cash on hand?

MR. FEINBERG: I will object to that question that has been asked of this witness.

Q Based on your experience, isn't that a fair and honest thing to say?

A I don't really know.

Q Let's get a little more into the case.

You have indicated you have examined the exhibits in this case; is that correct? All of them, right?

A Prior, yes.

Q One of the exhibits in this case is Exhibit 68A in evidence, which is transcript testimony given about a divorce hearing by Mr. Fisher?

A Yes.

Q Do you recall Mr. Fisher's testimony in there, do you not, in which he indicated that in 1966 he had given some $193,000 to Rosalie Fisher?

A Yes. That was in there.

Q I take it that in computing this chart you did not take into account that Exhibit 68A, that is the reference to the $193,000? Is that correct?

A I did not, no.

Q You ignored that exhibit?

A I had no evidence that there was any money that

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existed.

Q Had you taken that exhibit, offered by the government, into account, you would then have had down here cash on hand, the figure of $103,000; is that correct?

A If I had taken it, yes.

Q Which would have made a zero balance; indeed, it would have made better than a zero balance?

A Yes.

Q In fact, the government would have owed him money under your theory, right?

A Correct.

Q As a matter of fact, he therefore would have had a carryover of some $90,000 to carryover against 1968, 1969 and 1970; is that correct?

A Conceivably, yes.

Q Another thing, Mr. Spadola; losses are deductable, are they not?

A Yes.

Q I think you have indicated earlier that you had information Mr. Fisher for some period of time was involved in gambling; is that correct?

A That's right.

Q I take it is fair and honest to say you know from your experience that sometimes a gambler wins and sometimes he

loses; is that correct?

A That's correct.

Q I take it that there is no credit on this charge for any gambling losses for Mr. Fisher during any of these periods.

A There is not.

Q Let's go back up to these expenditures for a moment.

You have taken into account in determining the tax liability and everything else in this case against Gil Fisher expenditures that were made by Rosalie Fisher; is that right?

A That's correct.

Q In other words, what you basically did was if there were a number of checks offered in evidence by Rosalie Fisher--

A Yes.

Q She bought a number of things?

A Yes.

Q Some of them was as insignificant as Better Homes and Gardens for self and other very personal items; is that correct?

A That's correct.

Q In the income evasion case against Gil Fisher they were charged up as expenditures?

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A Yes.

Q Throughout the four years?

A Yes, all four years.

Q That was based solely upon the use of the exhibits? I am being a little repetitive, but I want to be sure on that.

A Yes.

Q You have an item here of the purchase of land and home construction in the amount of $82,000; is that correct?

A That's correct, yes.

Q That involves, does it not, some land in Englewood, New Jersey?

A That was one part of the $82,000, yes.

Q That was the greater part of it?

A No, no. The land was only $16,000.

Q I'm sorry. I'm confusing you.

What I meant was that the Englewood property, both the land and the house, that's what this is all relating to?

A The bulk of it is there.

Q Is it not a fact, sir, that the documents, the exhibits, in this case, indicate that that land was purchased by Gilbert Fisher, Sr. and Lulu Fisher?

A That's correct.

Q As a matter of fact, exhibit 76 plainly states that, does it not? That's one of the exhibits.

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A Yes.

Q Then there is an assignment on the back. Do you see it?

A Yes.

Q That's the deed to the property. Exhibit 38 is the agreement between Mr. Mentes, the builder, and Gilbert and Lulu Fisher; is that correct?

A Yes.

5-3 Q That's the elder Mr. Fisher.

I think you have indicated that all you did in making up this chart was to rely on the exhibits; is that correct?

A There was more to it than that.

Q This can only purport to be a representation of evidence in this case, right?

A True.

Q And the evidence in this case is either exhibits, testimony, or stipulation; is that correct?

A That is correct.

Q You have indicated of those three classes of evidence that were presented in this courtroom over the three-day period, the only class of evidence you relied on was exhibits?

A We relied on exhibits, but in those exhibits we

also relied on who made payments.

Q Where did you get that from?

A From the various exhibits -- Mr. Montes, particularly.

Q I take it, though, it is fair and honest to say that in attributing this $82,000 expenditure to land, house, and everything, that you attributed that to Gilbert Fisher, Jr., this gentleman here, although the agreements were made and signed by Gilbert Fisher,Sr.,his wife Lucy, and the people they dealt with?

A Yes.

Q In other words, you ignored, did you not, the plain face of the documents? Is that correct?

A Yes.

Q What exhibit numbers can you tell us you relied on which indicate the payments thereon, the purchase of the land and the home construction?

A I don't have the exhibit numbers, but --

Q Here are a bunch of numbers (indicating). You have an exhibit list.

Can you tell us which ones there show the payments?

Actually, why don't we go through the exhibit numbers on that?

You list Exhibit 76 up there; is that correct?

A Yes.

Q That's a document you relied on; is that correct?

A Yes.

Q Exhibit 76 is the agreement I just showed you signed by Gilbert and Lulu Fisher for the purchase of the house; is that correct?

A That's correct.

Q Exhibit 77 you relied on.

So the first document you list there, 76 there is nothing in 76 which in any way indicates that house doesn't belong to Gilbert Fisher, Sr. and Lulu Fisher; is that correct?

A That's correct.

Q That's a document you specifically say you relied on.

Now, 77, sir, another document you say you specifically relied on, is a document which plainly states, does it not, that the house is assigned to Lulu Fisher? Is that correct?

A That's correct.

Q So there is nothing in that document that in any way can serve as a basis for you making this a Gilbert Fisher expenditure? Is that correct?

By Gilbert Fisher I mean Junior.

A No. I had a basis -- under this document, no.

Q You relied on the documents. That's why I am asking you.

Exhibit 78 you indicate you relied on. Exhibit 78 is a receipt by Mr. Nussman relating to his client. It says Lulu Fisher, indicating: Received from Sidney Gross money which was received by Mr. Gross from Lulu Fisher; is that right?

A That's correct.

Q Exhibit 78A is another document of the lawyer, Mr. Nussman, which also indicates he received money from Mr. Gross which had been received from Lulu Fisher; is that correct?

A That's correct.

Q Document 80, that's a reference to client Lulu Fisher; is that correct?

A That's correct.

Q A deposit to Mr. Nussman for Lulu Fisher?

A Correct.

Q And Exhibit 81 is a check from Mr. Nussman, Lulu Fisher's lawyer, to Isaac Sherman and Tammara Sherman; is that correct?

A It is a check from Mr. Nussman, yes, to the Shermans.

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Q He is identified here on Exhibit 30 as the lawyer for Lulu Fisher; is that correct?

A Yes.

Q Did you ignore those documents?

A This is correct, my understanding was that he was not her attorney.

Q Did you get that understanding from looking at the exhibits?

A No. I got that understanding from Mr. Nussman.

MR. NAFTALIS: Your Honor, I move to strike that.

THE COURT: You asked him for whom he got the understanding.

MR. NAFTALIS: Your Honor, his testimony --

THE COURT: Don't argue. Overruled.

Q You read Mr. Nussman's testimony?

A No. I spoke to Mr. Nussman and I interviewed Mr. Nussman several times.

Q This is your interpretation of what Mr. Nussman had to say on the stand; is that correct?

A Yes.

Q I take it, based on that interpretation, you have ignored these documents and attributed these expenditures to Mr. Fisher?

MR. FEINBERG: I will object to the statement that

this witness ignored any documents.

THE COURT: Put the question to him again.

(Record read.)

A I didn't ignore the document per se. I interpreted the documents based on information I had with the attorney and various other people that I spoke to and interviewed and another agent interviewed that none of these monies came from Lulu Fisher or Gilbert Fisher, Sr.

Q You have not seen that in the transcript in this trial, have you?

A I have not.

Q You are relying in that regard not on anything which is in evidence before this jury on which they make a solemn verdict of guilty or innocence --

MR. FEINBERG: I object to that.

THE COURT: Sustained as to form.

Q So that judgment, Mr. Spadola, was made on information which is available to you in which you have interpreted, but which is not part of the testimony in evidence before this jury?

MR. FEINBERG: I object to that question.

THE COURT: He said he didn't know what the testimony was.

A I have not read the transcript.

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THE COURT: I have already told the jury that the only judgment with respect to these fact issues will rest upon the jury based upon the evidence in the case which will include documents plus oral testimony heard by the jury. It is not limited to documents alone. The evidence in the case is testimony plus documents.

t6 pm

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MF. NAFTALIS: Mr. Feinberg, can I get 132 and 133 and 129C through F?

Q I think you are acquainted-- when I say you are acquainted, her name has come to your attention during the course of your work in this case, the name Bernice Duncan?

A Yes.

Q Who is now married to this gentleman here and her name is Bernice Fisher, is that correct? I mean her name has come up.

A Yes.

Q Doing your charts for the years 1967 and 1968, and 1969 and 1970, you attributed as an expenditure for Gilbert Fisher all of her expenditures, is that correct?

A Those that were documented, yes.

Q And I want to show you two of them here, Exhibits 132 and 133 in evidence.

You have reviewed those, haven't you?

A Yes.

Q Those are receipts or bills or whatever for Miss Duncan when she went on a trip, is that correct?

A Yes.

Q Those bills are not Mr. Fisher's, is that correct?

A No, they are not.

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Q You know from your analysis of the documents in evidence here, that there are no documents in evidence in this case which indicate Mr. Fisher ever paid those expenses, is that correct?

A That is correct.

Q In any event, when you did your analysis for 1969, you still attributed the expenses reflected on Exhibits 132 and 133 to Mr. Fisher, is that correct?

A I did.

Q That was in conformance with your theory?

A That is correct.

Q I want to show you Exhibits 129C, D, E and F in evidence.

You have reviewed those documents, have you not?

A I have seen them, yes.

Q You can take another look.

A That's all right. This is the apartment.

Q These documents relate, do they not, to rent paid by Mrs. Duncan or Miss Duncan on an apartment that she had in New York City, is that correct?

A Well, it is rent on an apartment. It is leases on an apartment in New York City, yes.

Q The lease is in her name?

A The lease is in the name of Bernice Duncan.

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Q Those records reflect payments on the lease, is that correct?

A They do, yes.

Q There is nothing in any of those records that indicate that Mr. Fisher paid any of that rent, is that correct?

A On these documents, no.

Q There are no other documents in evidence in this case, are there, which indicate that Mr. Fisher paid Miss Duncan's rent, is that correct?

MR. FEINBERG: I will object to that question as to whether or not there are other documents in this case that go to that question.

THE COURT: If you know, he may answer.

Q Do you know of any other documents in this case which indicate that he paid her rent?

A No.

Q In any event, in reliance on the exhibits you put down here that you relied on, these Exhibits 129C, D, E and F, is that correct?

A That is correct.

Q And attributed Mrs. Duncan's rent payments for the apartment in New York City to Mr. Fisher, is that correct?

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A That is correct.

Q He was charged with an expenditure?

A Yes.

MR. NAFTALIS: May I have Exhibit 105, Mr.Feinberg. Let me have actually 100 to 105.

MR. FEINBERG: Mr. Naftalis.

MR. NAFTALIS: Thank you.

Q Mr. Feinberg has helped explain two documents to me. On this cost of living, residence, Englewood, New Jersey --

A What year is that?

Q I have got 1969. Actually I think it appears on all the charts beginning with 1967.

A Right.

Q I take it that basically every expense that was made in connection with that piece of land and that house you treated as an expenditure to Mr. Fisher, Jr., is that correct?

A That is correct.

Q You made no distinction, did you, between the time, that is the time between 1967 and -- in other words, your approach was no different for the period 1967 through 1969 when full and complete title was in the names of Gilbert Fisher, Sr. and Lulu Fisher, is that correct?

A That is correct.

Q So, therefore, when the beneficial ownership of the property was in the grandchildren, the boys, Gilbert the Third and Jeffrey, with Gilbert Fisher, Jr. holding solely as trustee for them, that didn't change your analysis?

A No.

Q So I take it, if I undersatnd it correctly,you took every expense of Rosalie Fisher which could be documented throughout the whole four years and charged it to him under these charts, is that correct?

A That is correct.

Q You took every expense you could document over the whole four years of Bernice Duncan and charged it to this man, is that correct?

A That is correct.

Q You also took every expense of Gilbert and Lulu-- Gilbert Fisher, Sr. and Lulu Fisher, in connection with the house in Englewood, and charged it to this man?

MR. FEINBERG: Objection.

THE COURT: Sustained.

Q You took every expense of the house which was owned, the title to the house was in the name of Gilbert Fisher, Sr. and Lulu Fisher, is that correct?

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A The title of the house, yes.

Q They signed all the agreements, is that correct, to your knowledge?

A I don't know. To my knowledge, the agreements are signed, but I don't really know whether they signed them or not.

Q None of the evidence that you have looked at in this case has indicated in any way that those are not their signatures, is that correct?

A No, I didn't say they weren't.

Q In any event, that house which they held good title to, is that correct, there were no liens on it or anything like that, is that right?

A That is correct.

Q You took all the expenses of that house which they held good and proper tile to and charged them to Gilbert Fisher also?

A Yes, those we could document.

MR. NAFTALIS: Your Honor, I might be done if I could have just one minute to chat with Mr. Wallace.

I think I am really at the end of the road.

THE COURT: All right.

(Pause.)

MR. NAFTALIS: I think I am done, your Honor.

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Thank you, Mr. Spadola.

MR. FEINBERG: Your Honor, I have a few questions, if I may, on redirect.

THE COURT: If you would like.

MR. FEINBERG: Thank you.

REDIRECT EXAMINATION

BY MR. FEINBERG:

Q Agent Spadola, under the cash specific expenditures theory, do you have to eliminate, as best you can, all non-taxable sources of income?

A Yes.

Q In this case, for the years 1967, 1968, 1969 and 1970, did you consider all documented non-taxable sources of income?

A I did.

Q Did you give a credit to Mr. Fisher for those sources?

A I did.

Q In your investigation in this case, Agent Spadola, did you inquire into the income of Miss Bernice Duncan?

A I did.

MR. NAFTALIS: Your Honor, I object to that.

THE COURT: I will allow it.

Q Did you inquire into the income of Miss Bernice

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Duncan during the years 1967 through 1970?

A I did.

Q Did she have any income during those years?

A None that we could find.

Q Did you inquire into the income of Rosalie Fisher during the years 1967 through 1970?

A I did.

Q Did she have any income independent of Mr.Fisher?

A She did.

Q What did she have?

A She did some- she had some sewing income.

Q Other than that?

A None.

Q Did you inquire into the income during the years 1967 through 1970 of Gilbert Fisher, Sr. and Lulu Fisher?

A We did.

Q Did they have any sources of income?

A Very little.

Q In the course of your investigation, did you uncover the fact that they had applied for Medicare during the years in question?

A Yes, I did.

Q Agent Spadola, in the course of your investigation did you investigate whether or not there were any sources

of income prior to 1967 for this defendant?

A We investigated and found none.

Q You found none. Was there any documentary evidence of any sources of income prior to 1967?

A None.

MR. FEINBERG: I have no further questions.

THE COURT: Before you go ahead, come up here.

(At the side bar, off the record.)

BY MR. FEINBERG:

Q You have the charts there. Do you recall Mr. Naftalis asking you questions about 1967?

A Yes.

Q Do you recall Mr. Naftalis asking you what would happen if cash on hand for 1967, instead of the thousand dollars, was $104,000; do you recall that?

A Yes.

Q You stated that that would be a credit, is that correct?

A Yes.

Q In the course of your investigation, did you find, Agent Spadola, any documentary evidence of cash on hand prior to 1967?

A I did not.

MR. FEINBERG: No further questions.

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RECROSS-EXAMINATION

BY MR. NAFTALIS:

Q Did you find any documentary evidence of cash on hand after 1967?

A We found some.

Q What was that?

A Let me rephrase that.

I didn't find any. I saw something in the transcript, the redacted transcript, of the divorce proceedings. That was the only place I saw it.

Q That was the document, Exhibit 68A, which refers to the $193,000 that Mr. Fisher gave to Rosalie Fisher in 1967?

THE COURT: He testified to that.

Q He testified to that, is that correct?

A That is correct, yes.

Q That exhibit and the testimony in that Government exhibit you indicated you did not take into account in doing your chart, is that right?

A That is correct.

Q I take it during any of your examinations here, did you come into contact with Exhibit G? Is that a document you have seen at any time in connection with this case?

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A I don't remember seeing this. What is the date on this?

Q 1971, summons and complaint in a lawsuit by Gilbert Fisher v. Rosalie Fisher.

A I don't remember seeing this. It might have been part of that divorce proceeding, I cannot recall, but the document per se I don't remember seeing.

Q You don't recall this document?

A No.

MR. NAFTALIS: That is all.

REDIRECT EXAMINATION

BY MR. FEINBERG:

Q Aside from Mr. Fisher's own testimony in Nevada about that $193,000, did you ever see any documentary evidence of that $193,000?

A I did not.

Q And in the course of these years, 1967-- well, never mind.

MR. FEINBERG: I have no further questions.

RECROSS-EXAMINATION

BY MR. NAFTALIS:

Q Did you ever, during any of your investigations -- let me withdraw that. Rosalie Fisher has talked to you and other agents of the Government?

A Yes.

Q In the course of any of these interrogations of Rosalie Fisher, did you ever request that you go to open her safe deposit box so you could go and look and see?

A We did not.

MR. NAFTALIS: You never asked.

MR. FEINBERG: No further questions.

THE COURT: All right, you are excused.

(Witness excused.)

THE COURT: Call your next witness.

MR. FEINBERG: Your Honor, the Government rests.

THE COURT: Members of the jury, remain in the jury box and counsel, come into the robing room.

(In the robing room.)

MR. NAFTALIS: Your Honor, at lthis time we would move for a judgment of acquittal under Rule 29.

If your Honor please, I think that from Agent Spadola's testimony, it is clear that the Government has attributed income to Mr. Fisher based simply on at least in large measure of an arbitrary analysis of holding him responsible for every expenditure made by Bernice Duncan, Rosalie Fisher and indeed his own parents, Gilbert Fisher, Senior and Lulu Fisher.

Now, with respect to the Rosalie Fisher aspect,

there is testimony, although obviously there is a question, at least we believe deserve credibility involving Rosalie Fisher but at least there is testimony in which she indicated that her source of income was this gentleman and the Esplanade Garage and a couple of other items.

With regard to Miss Duncan, with the exception of a couple of items, the rest of that testimony, there is no direct evidence whatsoever, indeed there is no direct evidence at all which indicates that Miss Duncan never spent a nickel that wasn't Gilbert Fisher's during this period, and that seems to be the Government's theory.

Similarly, with regard to the house in New Jersey, it seems to me that the Government's theory seems to make much of what I regard as highly prejudicial evidence with not as high probative effect as its prejudicial effect; that is, the delivery of cash and the like, certainly you have legal documents in that case--

THE COURT: Are you saying the legal documents are conclusive? Isn't that one of the issues of fact, whether this wasn't a device to cover up a source of income and couldn't it be even the very means of evading the payment of taxes by using the names of third parties, in this case, it was, it so happens it was the parents whose names were used ?

Are you suggesting that a man who is charged has income can put property in the name of a third party and that this is conclusive that the property and the title to the property is that of the person who are the grantees under the deed and the man can use the names of third parties as the persons who enter into a contract,and it is beyond question on the part of the Government, to show what the true relationship is and isn't the evidence of the cash payments probative as to who actually was the party in interest?

MR. NAFTALIS: Your Honor, I agree with you; as a matter of fact, I agree with every single word your Honor says.

The problem is you are always ahead of me, but I do put one dissent in. There is no question obviously that someone-- I could set up a piece of property in Ken Feinberg's name and it is really mine and it could be a device or vehicle for swindling somebody or doing some sort of offense, civil or criminal, but I think we start from the first premise here; there is not a hint of direct evidence that that is what happened here.

Mr. Nussman, the lawyer, indicated he thought it was a legitimate situation.

There is no admission by Mr. Fisher to anybody

he dealt with that this was his home.

THE COURT: Acts and conduct, of course, may pemit an inference.

In addition to that, there is evidence in the case, as I recall it, that the parents, who were quite advanced in years, to understate it, had no source of income.

There is also the testimony, as I recall it, of Mr. Fisher, Jr. in the Nevada proceedings which would throw a very serious doubt that the father had a nickel of income.

He even testified that he didn't know where he got the money from, which would knock out any claim which I suppose you are going to advance in this trial; it was advanced at the past trial, that the father had income as a gambler.

There is the defendant's own testimony in that case. That isn't to be overlooked.

There is the Medicare or Medicaid proof in the case, which in and of itself would suggest that he was without source of income.

Why isn't this an issue of fact as to whether or not the house, in fact, was his? Whether or not the money that was put up was his money and not the father's money?

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Q On your theory, then, with due respect to you, that all a person need do to protect himself against a charge of this type is to use cash and have a third party become the contractee on its various obligations and if real property is incolved, take the name of the real property in the names of third parties and if automobiles are bought, buy them in the name of third parties, and that isn't the law, and you know that as well as I do.

I didn't mean to interrupt your argument.

Go ahead.

MR. NAFTALIS: I think I made my record and my argument.

THE COURT: Respectfully, your motion is denied.

MR. NAFTALIS: Mr. Wallace has one matter he wanted to bring to your attention.

MR. WALLACE: Your Honor, this is a certified copy of the appeal in the Nevada divorce matter which I informed you on Monday that this had occurred. There was some question about the weight of a telegram or telephone communication with an attorney in Nevada.

It does appear from this that Gilbert Fisher and Rosalie Fisher are still man and wife.

THE COURT: Do you want that before this jury now? Do you really want to go into that? That was one reason

I ordered the issuance of the subpoena today for this lady.

It appears it won't make any difference on your statement if it were recognized in New Jersey. This is a bigamous relationship.

I am not going to stop you. If you want to put anything in the record, you can file that in the record.

MR. NAFTALIS: I think he was attempting to supplement a motion.

THE COURT: The motion was decided the other day. In addition to that, I held and the record is clear on it, there was a waiver in this case.

What do you want to file it for?

You can put it in the record. All you are doing is cluttering up the record.

I am suggesting to you, you ought to think twice about it because you may give the Government an opportunity to go forward with your defense to go into matters that I think they are precluded from going into now.

If what you say is so, he is still married to Rosalie Fisher?

MR. WALLACE: If he is married to her, obviuosly she could not testify against him and the Government's case would be in difficulty.

It is my belief that Rosalie Fisher and Gilbert Fisher technically are still wed.

THE COURT: There was nothing before me and I certainly would not act on a hearsay telegram of a lawyer.

You are simply trying to justify, I take it, as far as what you said in the affidavit, the telegram was fact. I will take your statement on it that you talked to this lawyer.

MR. NAFTALIS: You made your record. I think that is enough.

THE COURT: All right.

Let's move forward.

MR. WALLACE: Thank you.

MR. NAFTALIS: We expect to have a very, save for one possibility, we expect to have a very short case.

As I told Mr. Feinberg, from the beginning, the probabilities were very strong that Mr. Fisher would not testify. Indeed they were about 90%, from the beginning, and that is still the truth. In fact, it is now 100%. We will not put him on the stand.

In connection with certain stipulations and agreements and sicussions, Mr. Feinberg and I have had, he has agreed to stipulate with regard to the testimony of three witnesses-- four witnessess actually, to read in

the testimony that was given at the last trial by Aunt Janey Foy, I think her name is--

THE COURT: Is that the defendant's aunt who testified here brother was a gambler?

MR. NAFTALIS: Also Mr. Butterfield from the bank, we will read his testimony in. Then we have another stipulation with regard to two other witnesses.

All this is very short.

The only other item which may or may not take place is this: Is that Mr. Wallace has been,with the help of some people who have been helping him, have been examining on a kind of a last-minute breakneck basis, the documents in evidence, and the Government's papers , and there may be a possibility of putting in our own chart, our own aide memoire.

That, your Honor, we are not in a position to do now and we would have to see, you know, I suppose we will know tomorrow whether we can do it or not.

We don't know whether it is practical.

Other than that, all the rest is short stuff, there won't be the defendant.

THE COURT: What is your request?

MR. NAFTALIS: I wanted to inform your Honor--

THE COURT: Are you ready to go ahead now?

MR. NAFTALIS: -- with these other things.

Yes.

THE COURT: Suppose we go ahead with that and then you can think about the other overnight.

(In open court.)

THE COURT: Members of the jury, you heard that the Government has rested.

Now the defense may go forward.

Before you start, gentlemen, will you come up for one moment, please?

(At the side bar, off the record.)

(In open court.)

MR. NAFTALIS: Your Honor, Mr. Feinberg and I have reached a stipulation regarding, in lieu of calling two witnesses, and the stipulation is that if Eileen Page and Phyllis Lee were called, they would testify that Mr. Fisher, Gilbert Fisher, Jr., separated from his wife beginning in 1964, that is, his wife Rosalie Fisher, and that beginning in 1964 on, he resided at 470 Lenox Avenue and then at some later time in Englewood, New Jersey.

So stipulated, Mr. Feinberg?

MR. FEINBERG: So stipulated.

MR. NAFTALIS: That would be stipulation as to the two named individuals, both would testify that way.

Mr. Feinberg has also graciously agreed to stipulate with me to the reading of testimony of a witness to convenience that witness, so he won't have to testify here, is that correct, Mr. Feinberg?

MR. FEINBERG: That is correct.

THE COURT: Instead of calling the witness, they are going to read the testimony of a witness given on a prior occasion.

It will be assumed that if the witness were called, the same questions would be put and the same answers given.

MR. NAFTALIS: I am going to be reading, ladies and gentlemen, the testimony given on a prior occasion by the witness, by the name of Alfonso Butterfield.

I am reading at 757.

"Alfonso Butterfield, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

"Direct Examination

by Mr. Rosenthal:

"Q Mr. Butterfield, what is your business or occupation?

"A I work for a bank, Manufacturers Hanover Trust Company.

"Q Located where?

"A It's 55 West 125th Street.

"Q How long have you been employed there?

"A Over fifteen years.

"Q Fifteen?

"A Over fifteen, right.

"Q In what capacity are you employed there?

"A I am a vault attendant in charge of the safety deposit department.

"Q You are in the safety deposit vault section?

"A I am in charge of the safety deposit department.

"Q Did you earlier in the week produce,pursuant to subpoena, Defendant's Exhibits S and T?

"A I did, yes.

"Q Have you also produced, pursuant to subpoena, any rental records prior to 1966, of any vaults by one Rosalie Fisher?

"A Please repeat that. I didn't get it.

"Q Do you have any records here of any rentals by Rosalie Fisher of any safe deposit boxes before the year 1966?

"A Yes.

"Q May I see what you have, sir?

"A There are two contract cards and ledger cards, one rented to Mrs. Rosalie Fisher, April 15, 1964, and

one prior to that, November 1, 1962. And these are extra cards, when she rented a box and surrendered them.

"Q I show you Defendant's Exhibits Y for identification and ask you whether or not this indicates that on November 1, 1962, Rosalie Fisher of 2190 Madison Avenue rented a safe deposit box No. 586?

"A Right.

"Q And that she had it and continued to have it until November 15, 1966?

"A Yes, sir.

"Q Is that correct?

"A That's right.

"Q And am I correct, sir, in assuming that box No.586 was the size of Defendant's Exhibit S; is that correct?

"A That's right.

"Q Now, sir, do you know from your work Mrs. Rosalie Fisher?

"A Yes, sir. I rented her the box.

"Q You rented her the box back in 1962?

"A All three boxes.

"Q Did you see her frequently between 1962 and 1965?

"A Yes, sir.

"Q Thatis, 1964, rather?

"A That's right.

"Q Did anything occur in relation to the box that she had, 586?

"A The first box she rented, it became -- this we couldn't put it in the vault, in the case where it is supposed to go in. It was too tight. And we suggested to her she would have to take some of the things out of it or rent another box.

"Q When you say too tight, you mean the metal? Does the metal expand?

"A The way the vault is made, when you put a box in there, there is a lid on the box and if it is too tight we have trouble getting it in. It's got to go in freely and be taken out freely.

"Q What would it indicate to you when it was too tight, that the box had warped or it was stuffed full or whatever might be in there?

"A It was stuffed full so the lid would not go down as it should normally.

"Q And that was prior to 1964, is that right?

"A That's when she claimed -- she asked for another box or a larger box.

"Q In 1964, did she rent another box?

"A What happened was, she asked me --

"Q Tell us.

"A If I could get her a larger box. At the time there was none available. She said she would take another box the same size and I finally got her one.

"Q When was that, sir? What date?

"A She rented out a box.

"Q The second box.

"A April 15, 1964.

"Q Was that also a box of the same size as --

"A Yes, the same size.

"Q Did anything occur in connection with it? What box number was that?

"A The box number was 2060.

"Q Did anything occur with respect to box 2060?

"A After a while, the same thing occurred again that we were having trouble to get the box in and out of the vault.

"Q And was that because of some deficiency in the box or was it because of the fact --

"A No, no, not deficiency. Actually, if there was anything in the box that wasn't needed -- some people accumulate a lot of stuff there that is not needed and I explained to her if the box got stuck, it would be hard for me to get it out, there is no way to get it out and she claimed she had some other stuff she would like to put in thestuff and the things she had in the box she couldn't take them out. It wouldn't be safe to have them at home. She asked me if it was possible to get a bigger box.

"This was prior to the time she rented this box. It took me maybe a month or more before I could get her a bigger box that was available.

"Q And that was in 1966?

pgcy 3 "Butterfield"

"A Yes. Then I advised her when she came in to make a payment or something like that -- she came in to get something, and I told her I had a bigger box.

"Q And that was a box this size?

"A That's the largest we rent to customers.

"Q Exhibit T.

"A Yes.

"Q And she still has that box, does she not?

"A Yes, sir. She surrendered the two boxes and then put everything in the large box.

"Q Mr. Butterfield, have you ever seen the defendant Gilbert Fisher?

"A The first time I saw Mr. Fisher was when he came into the bank with Mrs. Fisher, Mrs. Rosalie Fisher. She gave him power of attorney to go into the large box she rented and the second time I saw him was when I came to court.

"Q You didn't see him in between?

"A No."

Then it is conceded that this was in December of 1969.

"THE WITNESS: I don't remember the date. It is on the card there when she gave him power of attorney."

That is conceded to be December of 1969.

"Q At any rate, you saw him on that one occasion

and that was it?

"A I can't remember seeing him again. If he went into the bank after that, it could be if I was on vacation or during my lunch hour.

"Q But you never saw him again?

"A I have never seen him again."

MR. NAFTALIS: That concludes the reading, your Honor.

THE COURT: Is that all?

MR. FEINBERG: Thats all.

THE COURT: Why don't we take our adjournment for today, members of the jury.

Before you go,however, there is something that I would like to say to you.

Off the record.

(Discussion off the record.)

THE COURT: Good night all.

(Time noted: 5 P.M.)

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UNITED STATES OF AMERICA

vs 74 Crim. 388

GILBERT FISHER,

Defendant.

New York, N.Y.

November 8, 1974
10:40 a.m.

(Jury in box.)

THE COURT: Good morning all.

Are we ready?

MR. NAFTALIS: Yes, your Honor.

Your Honor, at this time Mr. Fisher will offer in evidence testimony given at the prior proceeding by a witness named Jane Foy. Mr. Feinberg has kindly agreed to stipulate with me the reading in of the testimony of this lady.

"J A N E S T E W A R T F O Y, called as a witness by the defendant, being first duly sworn, testified as follows:

"DIRECT EXAMINATION

BY MR. ROSENTHAL:

"Q Mrs. Foy, look in my direction and if you don't hear me, tell me so.

"A I cannot hear you well.

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"Q I will come over closer to you, if I may. Can you hear me now?

"A Yes.

"Q And you read my lips also, I believe, don't you?

"A Yes.

"Q Are you the sister of Lulu Fisher?

"A I am.

"Q How old are you Mrs. Foy?

"A I am 84 years old.

"Q Are you the aunt of Gilbert Fisher who is seated at the table here?

"A I am.

"Q Do you know Rosalie Fisher?

"A Yes.

"Q Where do you live now?

"A 2186 Fifth Avenue, New York.

"Q With whom do you live?

"A My sister and I live together.

"Q Your sister Lulu?

"A Yes.

"Q And until the early part of this year did anybody else live there with you?

"A No, not since Mr. Fisher passed away.

"Q Until he passed away, he lived there with you?

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Did he not?

"A Right.

"Q By Mr. Fisher, do you mean Gilbert Fisher, Sr.?

"A No, I mean his father.

"Q His name was Gilbert Fisher also, was it not?

"A Right.

"Q How long have you lived in the same house or apartment with your sister and your late brother-in-law, Gilbert Fisher, Sr.?

"A Well, in this apartment you're speaking of?

"Q No, all together.

"A We lived in 1384 Seventh Avenue, for about 35 years.

"Q Were you --

"A With the family.

"Q You were part of the family there?

"A Yes.

"Q And then you moved to Fifth Avenue, how many years ago?

"A It will be four years in October.

"Q Next month?

"A Yes.

"Q Do you know what Lulu's husband did for a living?

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"A What he did for a living?

"Q Yes, what kind of work he did or anything of that sort?

"A For many years he was an elevator operator.

"Q Do you know what area he worked in, what section of the city?

"A It could have been, I don't really know, the garment district.

"Q That is your impression, is that right?

"A To my knowledge, it was.

"Q And then there was a time when the whole family was engaged in a Fish & Chips business, is that right?

"A Right.

"Q You were in that business?

"A Right.

"Q Lulu was in that business, is that right?

"A Yes.

"Q And Gilbert Fisher here was in that business, right?

"A Yes.

"Q In fact, you have a nickname for him, don't you, since he was a child. What is his nickname?

"A What?

"Q What does the family call this man?

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"A As a nickname?

"Q Yes.

"A Bootsie.

"Q Bootsie?

"A Yes.

"Q And that has been with him since his childhood, has it not?

"A Yes.

"Q And in the Fish & Chip business or while there was a Fish & Chip business, do you know if there was any gambling that went on there?

"A Yes.

"Q What type of gambling, do you know?

"A I think it was the numbers business.

"Q Do you know who was engaged or who took part or who ran the business?

"A Fisher.

"Q When you say Fisher, are you referring to Bootsie or are you referring to his father?

"A Gilbert, young Gilbert.

"Q Do you know whether or not his father had anything to do with the numbers business at any time?

"A I think so.

"Q Was his father a gambler?

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"A Yes, he was.

"Q And did you ever see Papa Fisher -- what was the name the family called Bootsie's father?

"A The children?

"Q Yes.

"A Papu.

"Q Did you ever see Papu with any big or large sums of money?

"A I have.

"Q And where was it that you have seen that?

"A In his bedroom in the closet.

"Q Was that at the Seventh Avenue apartment?

"A Yes. Yes.

"Q Did you ever see him give any money to Bootsie?

"A Yes.

"Q Can you tell us what day or date it was?

"A I don't know what day. I saw it many times.

"Q Do you know how much?

"A I do not.

"Q Was it a small package or big package?

"A It was a package like an average grocery bag.

"Q And was it coins or was it bills?

"A I imagine, I didn't have it, it was bills.

"Q You know that Bottsie has two boys, don't you?

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"A Yes.

"Q The oldest one has the same name as Gilbert.

"A The older one.

"Q And he has the same name as his grandfather.

"A Right.

"Q And then there is Jeffrey, the younger one, right?

"A Yes.

"Q Was your late brother-in-law fond of his grandchildren? Did he like his grandchildren?

"A Very much. He loved them.

"Q And did your sister like the grandchildren?

"A Very much. She loved them.

"Q Your sister is still alive, is she not?

"A Yes.

"Q What is her physical condition today?

"A She is a double amputee.

"Q Both legs have been amputated?

"A Right.

"Q What is her mental condition today, so far as memory is concerned?

"A Well, I could see a little change, not too much. But there is a little change, she is a little forgetful.

"Q Are there lapses of memory?

"A Yes.

"Q And she is not as old as you are, is she? She is younger than you?

"A Yes.

"Q She is your kid sister?

"A She is.

"Q How old is she?

"A She's 79 years old.

"Q Do you know anything about a house that was built in New Jersey?

"A Yes.

"Q And do you know who paid for the building of that house?

"A She and her husband.

"Q When you say she, whom --

"A My siter and her husband.

"Q Lulu --

"A Lulu Fisher and Gilbert Fisher.

"Q Gilbert Fisher, Sr.?

"A Senior.

"Q How do you know that they paid for it?

"A What?

"Q How do you know that they paid for it?

"A You're talking a little too loud.

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"Q How do you know that they paid for it?

"A I do know they paid for it.

"Q How do you know that?

"A They told me.

"Q They told you?

"A Yes.

"Q Did you ever see them give Bootsie any money in connection with it?

"A Yes.

"Q You don't know how much, do you?

"A No, I don't.

"Q Do you remember going to New Jersey at any time with Lulu and her husband to any lawyer's office about the house?

"A Yes.

"Q Were you there when they were there?

"A Yes.

"Q And do you remember whether or not they paid any money at that time?

"A Yes.

"Q And was Bootsie there also?

"A Yes."

That completes the direct examination.

Mr. Feinberg will read the cross-examination.

MR. FEINBERG: (Reading):

"CROSS-EXAMINATION

BY MR. FEINBERG:

"Q Mrs. Foy, how old was Gilbert when he passed away?

"A He died in February.

"Q How old was he?

"A I think he was 87.

"Q Do you know when he stopped working?

"A It must have been five years, or more.

"Q Five years or more?

"A About four. He became disabled.

"Q When he stopped working, what was he doing? What was his last job?

"A He had no job. He wasn't able to have a job.

"Q How did he live?

"A He had income. He had his Social Security and he had some savings.

"Q Was that how he lived, on his Social Security and his savings?

"A Yes.

"Q Did he have any other monies saved up besides savings?

"A He did.

"Q Where was that?

"A He had put it away. I don't know where.

"Q And he kept that?

"A It was his money. He had put it away.

"Q And did he take care of Luly with that money too?

"A She had income.

"Q Who did?

"A Lulu.

"Q Lulu did?

"A Yes.

"Q Where was Luly working?

"A Lulu hasn't been able to work in almost ten years because of her condition.

"Q So Lulu's husband took care of her?

"A When he was able physically.

"Q Did Mr. Fisher's son help him out?

"A Daughter?

"Q Did Bootsie help out his father?

"A At times, yes.

"Q When?

"A I don't know just when.

"Q But at times Bootsie helped him out?

"A Yes.

"Q How?

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"A Physically.

"Q Physically?

"A I mean, financially.

"Q Was Mr. Fisher grateful? Was he grateful for Bootsie helping him out?

"A Grateful?

"Q Yes.

"A I think so."

#2 This concludes the reading of the testimony.

MR. NAFTALIS: Your Honor, the defendant, Gilbert Fisher, rests.

THE COURT: Is there any rebuttal?

MR. FEINBERG: No rebuttal, your Honor?

THE COURT: Both sides rest.

I will hear you in the robing room.

(In the robing room.)

MR. NAFTALIS: At this time I want to renew the same motions that I made at the close of the government's case, a motion for a directed verdict for acquittal and the like.

THE COURT: Motion denied.

MR. NAFTALIS: I would also move at this time to strike from evidence the aid memoir prepared by Agent Spadola on the ground that his testimony shows that that

was not based entirely on matters in evidence here.

THE COURT: Motion denied.

MR. NAFTALIS: Your Honor, with regard to the summations which we are going on to now, I indicated to your Honor that I thought I would need about an hour. I did not finish writing my summation. I didn't start doing it until last night and went through until 2:30 or 3:00 o'clock in the morning. I hope I don't go beyond that time, but is there the possibility of having a little extra time? I have a huge stack of papers.

THE COURT: We will give you one hour and 15 minutes.

At first you wanted 45 minutes. Then you asked for an hour. I will give you one hour and 15 minutes.

MR. NAFTALIS: May I have a few minutes before I start?

THE COURT: Yes.

(Short recess.)

(In open court.)

THE COURT: The lawyers are about to sum up. There is no need to put this on the record. Off the record.

(Short recess.)

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2am

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(In open court, jury present.)

THE COURT: Mr. Naftalis, please watch your time.

MR. NAFTALIS: Judge Weinfeld, Mr. Feinberg, Mr. Foreman, ladies and gentlemen of the jury:

At the very outset of my remarks, let me thank you sincerely and deeply for all the courtesy and attention that you have shown to myself and to Mr. Feinberg and to all the other witnesses and participants in this trial.

I want to thank you also for performing what I conceive to be the most important public service that a citizen can perform, the duty of jury service.

Jury service is an awesome and terrifying responsibility because you ladies and gentlemen are called maybe for the one and only time in your lives to sit in judgment upon a fellow human being, and to sit in judgment and pass a judgment that is binding, that will affect the course of his life.

This is the last opportunity I will have to speak with you about the evidence in this case or rather what I suggest you will find is an utter lack of evidence in this case, once you clear away the smokescreens and red herrings that the Government has thrown in to divert your attention from the absence of proof.

After I finish speaking, the prosecutor, Mr. Feinberg,

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will speak last. The prosecution speaks last in a criminal case because it has the burden, it has the burden of proving its accusation, its charge to the high and rigid and exacting standards of "beyond a reasonable doubt."

Because of that, the prosecution speaks last and I will have no opportunity whatsoever to get up here again and speak and rebut or answer any of the arguments that Mr. Feinberg makes.

So what I am going to try and do the best I can, maybe I won't be able to anticipate all of them, is to try and anticipate some of the arguments that Mr. Feinberg is probably going to make and supply to you what I suggest you will find are ready and convincing answers to all of them.

If I had my choice, ladies and gentlemen, I would rather that I could stand up here next to Mr. Feinberg and debate the issue and show you and answer his arguments directly, and show you where the weaknesses are in the Government's case, but the procedure doesn't provide for that.

Also if I had my way, I guess, I would rather like to go down the rows of jurors here and have an individual conversation with each of you, ask each of you what questions you have about the case and try and answer them,

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try and explain the evidence as best as I could.

Again, the procedure doesn't allow for that so I am going to try and have to do the best I can, and that is to try and anticipate the questions you have and try and answer them as I analyze what the Government purports they claim as evidence in this case.

Now, I told you at the beginning of the trial that an opening statement is not like a politician who makes speeches, such as they made before last Tuesday, because when a politican is running for office, he doesn't get called upon his promises or commitments until after the votes are counted.

In a jury trial, in a criminal case, when a lawyer, whether he be prosecutor or defense lawyer, makes a commitment in his opening statement, he gets called on that commitment before the votes are counted, so when Mr.Feinberg told you there would be evidence in this case that Gilbert Fisher, Sr. and Lulu Fisher were on welfare -- you have heard the evidence and there wasn't any.

Now that doesn't mean very much. All that goes to show is that what Mr. Feinberg said is not evidence. The evidence comes from his witnesses.

Mr. Feinberg, all he was giving you then, was a preview of what he conceived to be the evidence.

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I told you certain things would be proven and I am going to account for those commitments right now.

There are, as I said, however, certain smokescreens injected into this case which I suggest do nothing more than divert your attention from the Government's failure of proof, and I want to deal with these.

The first of these is the fact that Gilbert Fisher is a gambler. No doubt about it. There is no dispute about it. He admits it. He freely admitted it under oath in his transcript, 68A in evidence, a Government exhibit, in the Nevada divorce proceedings. There is no question about that.

I don't know whether you like gamblers or you don't like gamblers or whether he is a good gambler or a bad gambler, but he is not on trial for being a gambler. That is not what he is on trial for, and so on't be diverted by any appeals to your emotions about him being a gambler because you may have some preconceptions about gamblers, and he is not on trial for that.

Don't let that fact divert your attention from the lack of evidence in this case about the tax evasion charge. Another smokescreen, I suggest, ladies and gentlemen, that Mr. Feinberg will probably refer to and try and make something out of is the fact that Mr. Fisher

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paid some bills in cash.

Now, he is not on trial for that. Paying bills in cash is not a crime under any statute that any of us are aware of.

As a matter of fact, as you recall, there were receipts and documents littered throughout this record evidencing these cash payments, so don't let this fact divert your attention away from what the charge is in this case. Don't let that red herring divert your attention.

There has been some other proof that I am sure we will hear from Mr. Feinberg that Mr. Fisher purchased automobiles or maybe somebody else purchased automobiles and maybe he helped them pay for them and maybe he didn't, and that Mr. Fisher now lives in a nice house which was paid for by his folks and is now owned by his children, and he is living there with his present wife and two children.

Living in a nice house, whether it has a pool or doesn't have a pool, and having an automobile, those are not crimes either, and don't let any appeals to your emotions about high living and all that substitute for absence of evidence.

These are all smokescreens.

You sit here and weigh the evidence and ask in your own minds, let's hear some evidence. Let's hear some

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evidence about what happened, not about that kind of junk.

Now, the charge here is that taxes were evaded by preparing and causing to be prepared a false income tax return. That is the charge.

I told you in my opening statement that this is a very strange case. It is a strange case because the tax returns in this case, Exhibits 1 through 4, the criminal documents, they don't even bear this gentleman's signature.

He is charged with preparing them and causing them to be prepared. He didn't even sign them.

I told you,and I repeated to you that the evidence would show that his signature of Gilbert Fisher on these tax returns was a forgery put on there by the Government's star witness Rosale Fisher, and I think we have showed that.

There is no dispute of that, that Rosalie Fisher forged Gilbert Fisher's signature on those tax returns.

If you look at them carefully, the signature of Gilbert Fisher on those tax returns, and compare it to other documents in this case where Gilbert Fisher really signed them, you will see that Rosalie Fisher tried awful hard to make the signatures look alike and to make it different from her own signature.

I told you in my opening address that this also

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was a very strange case for another reason because we had something called joint tax returns, the same kind of tax return that my wife and I fill out, and I guess most people here on the jury who are married fill out; that is the husband and wife,Mr. and Mrs. John Smith, 227 Spruce Street, and you add up both their incomes, and they both sign .

It is a tax return of two people and that is what the tax returns were in this case.

But, of course, Rosalie Fisher, her name is not on any of those charts.Rosalie Fisher is not named in this indictment. She hasn't been prosecuted for anything and you have heard testimony from her own lips of the number of crimes that Rosalie Fisher committed, the number of times that she committed perjury or lied to agents or phonied up medical bills or prepared false affidavits, and yet she hasn't been prosecuted for anything.

Then there is also somebody else's name on those tax returns; he is a preparer, you know, a fellow you go to, to get your returns prepared. That is a man named John Singleton, and John Singleton, if you recall, was a childhood friend of Rosalie Fisher's down in South Carolina, and he is not on trial, and you will find from the evidence the reason he is not is he has become cooperative also.

You remember there was evidence in this trial,

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cross-examinationof John Singleton -- "When you were questioned by the agents on January 19, 1973, you told the agents that you were being investigated, you were being examined for tax returns during 1965, 1966 and 1967," and then beginning at that point in time and continuing throughout, he begins giving information to put the finger on Gilbert Fisher.

What happens? Who? The investigation dropped. Singleton is free as a bird.

Well, that is the kind of witnesses upon which this case is based. John Singleton and Rosalie Fisher.

Rosalie Fisher, the key witness, the one who has got a deal, hasn't been prosecuted for anything, all these crimes she has committed, she hasn't been prosecuted for one of them.

John Singleton, he hasn't been prosecuted for anything either.

The No.1 witness in the case, the first one out of the box,and you can find that means the most important witness, Rosalie Fisher. The second one out of the box, John Singleton, the second most important witness.

Neither of them were prosecuted. That is the Government's one-two punch. Start off strong with your big witnesses. Rosalie Fisher and John Singleton.

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Except they just didn't turn out to be too good.

Now, you saw these people testify. You look at witnesses, ladies and gentlemen. There is nothing special about being a juror. You don't have any magic guidelines as to how you look at people as to wehther you believe they are truthful or not. You look at them and just use your plain old common sense. You do it like you do in your normal, everyday life to somebody who impresses you as truthful. "Does he look like he is evading questions?" You use the same kind of special judgments here that you use in your everyday life. There is nothing additional.

You ask yourselves, did these twi witnesses, the two star witnesses of the Government, were they candid? Were they straightforward? Did they always tell the truth? Did they change their stories to fit the convenience of whoever was questioning them? Did they play fast and loose with the truth? Did they only admit things when they were confronted with hard evidence which caused them to change their stories? Do they have motives to testify falsely?

You have heard John Singleton's motive. The IRS was looking into him. He began cooperating. That was the end of that investigation.

Also the motive about not being prosecuted for any

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of these other things; Rosale Fisher the same thing. Rosal
Fisher had a few other motives.

There has been evidence in this case, and I don't intend to harp on it, that the marital relationship began, I suppose, was relatively stormy between Mr. Fisher and Rosal Fisher and she indicated on the stand that he had quarreled with her before he left because he felt she was drinking too much.

I don't think anything about that ought to be held against her, but I do think that it ought to be understood that there is some hard feelings on her part.

The man is happily married, he has two children. They have had a lengthy divorce proceeding. All sorts of financial squabbles and the like, all of which, ladies and gentlemen, as you can see from her testimony, gives her a very strong additional motive to pin the rap on Gilbert Fisher.

Now, let me just run through - I don't intend to run through all of her testimony-- it is not my function to use this podium as a slaughterhouse of anybody's reputation, but I feel obliged to point out some of the things in her testimony, not all of which, and in Mr. Singleton's testimony, which I suggest you will find relevant in making a determination as to whether those are the

kinds of witnesses you would want to make a great decision involving the liberty and life of a human being.

Now, there is no question that this woman, Rosalie Fisher, went before a federal grand jury in this building. She took an oath to tell the truth and a grand jury, if you recall, is a body composed of I think 23 citizens, people like yourselves. She took an oath to tell the truth and there is no question that she repeatedly lied and lied and lied.

She admitted that under oath from the stand. It might have taken a little doing, but after she was confronted with her prior testimony, she admitted finally, and admitted and admitted that this wasn't the truth and that wasn't the truth and that wasn't the truth.

Of course, this is perjury which is a very serious offense. Perjury, which the Government's wisdom and majesty, has not saw fit to charge Rosalie Fisher with.

But let's start with some of the false testimony she has given and maybe we can figure out why she has given it.

She testified in the grand jury, pages 199 to 204 of the transcript, -- I may read some of the transcript, I may not -- I am just giving you my recollection of the evidence -- you have a right, when you go into the jury

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room, to request that anybody's testimony be reread to you if you have any problems recalling exactly what somebody said and I suggest you do it if you think it would be helpful.

She testified under oath in the grand jury that, yes, she looked at the tax returns for each of the four years and she says, yes, that is my hsuband Gilbert Fisher's signature and he signed it after reviewing everything.

Prior to going into the grand jury, she was interviewed by some of the squad of Internal Revenue Service Agents who worked on this case, and she was also questioned about that, and again she did not tell the truth.

Again she said that is Gil Fisher's signature on the returns.

That, of course, is a lie. There is no question about it. That is an absolute outright perjury.

Then she also testified in an interesting way that she only admitted, remember this investigation has been going on for a long time, she was questioned a long time, she testified in the grand jury some time ago -- she only admitted for the first time to the Government that she had not told the truth under oath in the grand jury just last September.

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So we know the only reason she ever admitted this falsehood was because she was called on it: someone could show a piece of paper. Thank God for handwriting experts!

You can find the reason she had told this story all along was it brings Gil into it, if he signed the return. But he didn't sign it.

Remember, even according to her testimony, they had separated in May of 1967, so it is a little ludicrous that he would be coming up the house all the time, particularly given the problems they were having. Indeed, I will get into this a little later. She was pushing that date a little forward to help the government because we stipulated to the testimony from two disinterested witnesses that it was really in 1964 that Gil Fisher left.

Well, be that as it may --

Now, another statement of Rosalie Fisher wherein she admitted it was not the truth that she told to the grand jury, she subscribed to a false affidavit to this effect, when she put down that the only sources of income that they had between 1960 and 1965 were from Fish & Chip restaurants, and she lied when she said there was no numbers income during that period. She admitted on the stand here, pages 147, 149 and 155 of the transcript, that those were lies.

She signed a false affidavit. She had given false testimony before the grand jury.

Of course, the government, in its wisdom and majesty, has not chosen to prosecute her for that either

The reason for this lie, you may find, is that in 1960 on she was involved in numbers. It just didn't start January 1st, 1967. The reason for that was that she assumed that that would help the government. The more she could put in 1967, the more she could help the government. That's how her mind worked. The more she could help the government, the more she could protect herself, and the more she could wreak a little vengeance on her ex-husband.

I started to talk a little bit about 1967 and I told you that she said it was 1967. I don't know. Two disinterested witnesses, Phyllis Lee and Eileen Page -- Mr. Feinberg and I stipulated to their testimony yesterday to avoid the inconvenience of their coming down here -- they testified it was 1964. That's what Mr. Fisher said in Nevada, that it was 1964.

The reason, as I say, she pushes it as far forward as she can is to add some credibility to that ridiculous story that Gilbert Fisher would keep on popping around there with this kind of break-up in 1969 and sit down with John Singleton and go through a charade every

year on the taxes. That was a charade!

Another falsehood of Mrs. Fisher, which I can explain the reason for, is about the safe deposit box. I think she said she only had one at the beginning and at the end of 1965 and 1966. Then she said, "I only began putting money in the safe deposit box in 1967."

Of course, the way her mind is operating, that helps the government's case. It helps the government's case because this money could not have been there before 1967. If you remember, under Agent Spadola's testimony -- and I pointed out him -- that Exhibit 68A, the Nevada transcript, which the government offered of Gil Fisher's testimony, indicates that he had given her a large sum of money in 1966. This is before the tax year in question. That was an exhibit the government offered, and that was testimony that was given before this indictment.

Agent Spadola, in all candor, said, "Had I taken that fact into consideration" -- he indicated that it was an exhibit he decided to ignore, a government exhibit -- "that would have wiped out the tax liability, and Mr. Fisher would be a free man." That theory, by the way, I will have something to say about. It is a theory as opposed to evidence.

So she says, "No, no. It all happened in 1967."

She needed a large box because the smaller boxes were expanding since they were being filled up with things. I don't know how many driver's licenses you can put in there, something to expand.

You will remember that yesterday we read the testimony of a man named Alphonso Butterfield. He was a totally disinterested witness. He had no axe to grind, no interest in the outcome of this case. He is the man who was in charge of the safe deposit box department at the Manufacturers Hanover Trust Company. He put the lie to Rosalie Fisher's testimony. He told you it was not the end of 1965 or the beginning of 1966 that she started having a safe deposit box. That goes back to 1962.

And the reasor she had to keep on getting additional safe deposit boxes was that they were becoming so stuffed they could not get the lid down and get them into the slots. That's his testimony from pages 488 to 491 of the transcript.

He indicated also that she was given a larger box because these boxes were getting so stuffed in 1961 -- not '67; she was given the largest safe deposit box the bank had.

#2 You may find that people don't need these boxes at that time for just a marriage certificate or driver's

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license or passport. Those are not exactly the kind of things which are going to make something expand. Well, maybe it was because of the money that Gil Fisher had given her in those earlier years, the money which wipes out the whole government's theory in this case.

Another interesting thing, we had Mr. Spadola on the stand. He is an honorable man; he is doing a good job; he is a good public servant. But he indicated something interesting: Gee, the government, although they had all this information in front of them, even though they knew about the Nevada transcript and the money in the safe deposit boxes, and they talked to Rosalie Fisher a lot of times, and so on and so forth, a funny thing, they never even made any attempt to look into that safe deposit box.

Isn't that interesting? I suggest that that doesn't help the theory of the prosecution.

Anothe thing that is somewhat interesting is that in a prior trial here Rosalie Fisher testified in a false manner against Gil Fisher. That's at pages 145 through 147 of this transcript. Her testimony was so inconsistent with what she had said before, and was so full of mistakes, and so contrary to the facts, that she admitted on the stand after she had given that testimony an honorable, upright, decent prosecutor like Ken Feinberg read her the

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riot act and told her those things. That's the kind of lady she is.

Let's go on to John Singleton.

I told you about his IRS troubles. Singleton was an interesting witness. He didn't testify that long ago. He was a witness who, I suggest, you may find didn't like to answer questions. It was very hard to get him to answer questions.

You must still remember the painful times we had to ask Judge Weinfeld, "Could you please ask the witness to answer the questions?"

Judge Weinfeld patiently asked Mr. Singleton, "Would you please answer the question."

He is a man from whom we had to pull teeth to get the answers.

He is the man who studied pre-law for three and a half years at New York University. I suggest you may find he was quite a Philadelphia lawyer.

John Singleton was a fellow with a very keen instinct for his own self-preservation, a keen instinct for number one (indicating). He was going to do anything he could to keep himself out of this. He didn't want to know anything.

Do you remember he said in response to certain

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questions on cross-examination, "Oh, no. No. You are not going to incriminate me. I am not going to answer that. No, no. You are not going to implement me. You are not going to corroborate me with that." I think that that is John Singleton.

Singleton, I suggest, had a few things to be concerned about had the government decided to go after him. That's his reason to give testimony which he believes, in his mind, is helpful to the government.

This evidence goes to show his motive. When a fellow has done something wrong for which he could be prosecuted, that gives him a very strong motive not to be truthful if he believes that would help him in not being prosecuted. And that's about John Singleton.

Remember, he admitted he was a preparer. He liked to call himself "assisting in the preparation." He signs as the preparer, and he testified at an earlier occasion that he was the preparer.

He prepared a false tax return for the Esplanade Garage where he left off the income of the officers. This was a return which was signed by Rosalie Fisher and by John Singleton. He knew what those salaries were because he had filed another exhibit called Government Exhibit 13, which was the Social Security tax reports -- I

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think it was 941's, or whatever the number is. I am sure Agent Boltja and those people know the numbers better than me. He signed that return under penalty of perjury, but that was something he had to worry about. Nothing has come of that.

In 1970 he prepared a false income tax return for Rosalie Fisher, an individual return. This is after they stopped filing joint returns. There was some rigamarole about it and, finally, Singleton confessed and said, "I filed later an individual return for Rosalie Fisher, not Gil Fisher." Singleton, on that individual return he prepared, he left off all the income from the rooming houses.

Singleton, if you will remember, was not just a tax preparer: he was a rent collector. He was the guy that went around and collected rents for a percentage off the top. He, above anyone else in the world, knew that there was rental income, and yet he left it off. That's something else he had to worry about, since he put it on the joint return.

Also, remember this exhibit, I think I passed it to you, Government's Exhibit 29. This is a document, if you will, where there was testimony in 1971 that the Internal Revenue Service was beginning its investigation of

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the tax returns. This was 1971, long after Gil Fisher was gone from that house. Indeed, by anybody's testimony, he is not around there at all in 1971.

So they contact Singleton, and Singleton talks to Rosalie Fisher and they decide that they need some kind of affidavit to support a loan that she had put down on these returns from her mother, Anna Snype, so what do they get prepared? They get this phony document, Government Exhibit 29, a phony document referring to a loan agreement for loans in 1967, 1968 and 1969 -- except they slipped up because they dated it May 3rd, 1967.

Of course that's a little ridiculous!

This document was prepared, according to the testimony of Rosalie Fisher, by John Singleton. This is at pages 160 and 162 of the transcript. That document was prepared by Mr. Singleton with the assistance of Rosalie Fisher, after they knew they had to get some information to get to the IRS to get the IRS off their heels.

That was another thing to worry about.

Do you remember all those phony medical bills? These were also prepared in 1971, four years after Gil Fisher left -- even if you believe Rosalie's story -- and seven years after Gil Fisher left, if you believe the testimony of disinterested witnesses whose testimony is

stipulated to in the defense case.

#3 Rosalie Fisher made up a bunch of phony medical bills. There is no question about that.

Initially, when she was questioned by the Internal Revenue Service, she lied and said they were legitimate medical bills. But she admitted that that was a lie on the stand. She gave these to Singleton and he passed them on to the IRS so they could substantiate deductions. These are absolute phonies that Rosalie and Singleton submitted to the IRS. Anybody could see it.

The easiest one to see is Exhibit B. This is a bill supposedly from a doctor named Robert Purnell. He is a doctor who practices on Park Avenue. Did anybody here ever see a bill from any doctor, let alone a doctor who practices on a fancy, swanky street like Park Avenue, a bill that looked like this? You can bet that Agent Boltja and Spadola must have laughed their heads off when they saw this bill being brought in to substantiate those tax returns. Or, another thing, the prescription blank, Exhibit C, which Rosalie admitted she took without permission -- or she "steals" as some people call it -- from Dr. Calfon's office.

Or Exhibit A, Dr. Day's bill, which is not a bill but a blank piece of paper with the name typed in --

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and so on and so forth.

Well, I suspect you might find from the evidence that Singleton and Rosalie are quite concerned about that. It gives them something else. That's tax cheating; that's tax evasion; that's phony business.

Gil Fisher did not prepare those bills. He was not there in 1971.

Ladies and gentlemen, ask yourselves these questions:

Is the testimony of Rosalie Fisher and John Singleton the kind of testimony that you would rely on in an important judgment in your own lives?

Would you make an important decision affecting your family, your loved ones, or yourself on the testimony or word of people like Rosalie Fisher and John Singleton?

Wouldn't you hesitate to act on their word?

If Rosalie Fisher and John Singelton and went up to you and told you they had a business deal for you and wanted you to invest some money in it, would you do it? Would you put up a few thousand dollars if Rosalie Fisher and John Singleton went up to you now? Would you do it?

I doubt if any of you would think a minute before you said no, before you relied on any words of these people.

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Shouldn't you hesitate to act even more if what they are telling you to do, if the business deal they are trying to sell you, is to strip a man of his liberty and dignity, this man over there!

Ladies and gentlemen, all people are equal before the bar of justice in this court, and a witness does not become any better or any worse if he is called by one side or the other. A witness, whether he is the same witness called by the defense or by the government, he doesn't get any added bonuses. All witnesses are treated equally.

But could you imagine if we, in this trial, had called witnesses the likes of Rosalie Fisher and John Singleton, called them as witnesses for the defense! Imagine! Imagine if we put them on! All you know about them, all their perjury, their tax cheating, the whole business -- and I called those people to the stand to say, "Yes. During 1967 through 1970 Gil Fisher was not in the country, he was in Hawaii" -- alibi witnesses -- if those witnesses were called for the defense, do you think you would believe them for one minute? You would laugh. You would convict in two minutes Gil Fisher who had the temerity to put on that kind of garbage as witnesses for himself.

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Really, just forget about them. Really. Why don't you concentrate on something else."

I suggest that Mr. Feinberg makes that kind of argument because the credibility of these witnesses is zero. Zero. His star witnesses, witness number one and witness number two, their credibility is zero.

It is just like in a football game where he sends these two people in to be quarterbacks. All they throw are interceptions. The only thing he can do now is play "catch-up football." Being the able prosecutor he is, Mr. Feinberg is trying to salvage this case by saying, "Maybe you ought to forget about these people. Maybe we made a mistake."

Ladies and gentlemen, don't be fooled by that smokescreen. Those are the star witnesses. Those are the people sitting there not being prosecuted. Those are the people put on first and second in this case.

Now, there was some testimony in this case about a house in New Jersey. The documents in this case, that Agent Spadola supposedly relied on in making up his chart, all show beyond any doubt -- legitimate business documents prepared by an honorable and honest lawyer, Aaron Nussman -- that this land and this house were bought for and paid for by Gilbert Fisher, Sr. and Lulu Fisher.

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They are no more or no less believable just because the government calls them. Indeed, they are even less believable because the defendant in a criminal case doesn't have to prove anything. There is no obligation on the defendant to produce any proof whatsoever. He just sits back and he can let the government put in its proof. But the government has to prove -- and his Honor will so instruct you on the law, and I don't want to interfere in that area -- beyond a reasonable doubt, a very exacting standard. Would you really believe witnesses like those people beyond a reasonable doubt and therefore convict a man of a federal felony? I suggest you should not and you would not.

I will tell you another thing. I am trying to anticipate what Mr. Feinberg is going to do. It is a little tough, but I bet there is one thing that he is going to do, and that is he is going to try to disown the testimony of his two star witnesses, witness number one and witness number two, Mrs. Fisher and Mr. Singleton. He is going to tell you, "Gee, even though I called them as my first two witnesses, and even though they have not been prosecuted for any of those things, even though they have been cooperating with the government for a long time, and all that, they are really not that important in this case.

The evidence is clear that they bought it for their grandchildren, which, I suppose you may find, most people have never thought to be a crime in this country.

#4 You remember the testimony of Aaron Nussman. He is the lawyer. He said he had been practicing in New Jersey for 26 years, 36 years. He looked younger than the amount of years he had practiced law. It left an impression on me.

He told you that he was the lawyer for the elder Fisher. Mr. Feinberg jumped up and objected because he was shocked and surprised. He was hoping that Mr. Nussman would help him. I suppose that's why he called him.

Mr. Nussman's testimony hurts the government here. Mr. Nussman's records show that the client in this case was not Gilbert Fisher but his mom, Lulu Fisher. It says so right on the exhibit. I show you Exhibit 80: Lulu Fisher, client.

I show you Exhibit 78A; I show you Exhibit 78, contracts, the agreements. Mr. Nussman's documents show that.

Mr. Nussman's records show receipts of money from Lulu Fisher and not from Gilbert Fisher. For example, I point to Exhibit 78 in evidence: Client, Lulu Fisher;

received, Sidney Gross of Teaneck Realty, $1,650 -- which was received by him from Lulu Fisher as a deposit on Lot No. 6A in Englewood.

Remember Mr. Reynolds, the pool man that they put on to testify about the pool. He testified that he had talked to Gilbert Fisher. Whose check did he get? Remember, he got a check for the pool. The check was from Lulu Fisher.

Well, the government says, "We are going to ignore all these documents."

I remember, I was questioning Agent Spadola about the government's theory. "We ignored all these documents and the fact that Lulu Fisher gave a check and a deed that was signed." And there was testimony, and the agreements are notarized, and Mr. Nussman remembers talking to him and advising him about the trust arrangements which he, himself, was the initiator of. It was his idea.

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The Government ignores it and says we will find this was all a big sham.

Do you really believe that an honorable man, an honorable lawyer like Aaron Nussman, who was called as a Government witness, no one has shown him to be a tax cheat or perjurer -- do you think he would come in there and draft phoney agreements to facilitate a tax fraud?

Do you think that? Do you think Aaron Nussman made himself a party to any tax fraud? You bet your boots he did not because that is bunk. It is like the Government's theory, it is bunk.

They say wait, wait a minute. They say, "Gee, because he went to the job site and paid some of the people money and some of the payments were in cash," which I said to you, a big smokescreen, right? I don't see what difference, frankly, it makes whether he hands him a check or cash because $10,000 is $10,000.

They say he went to the job site and spoke to the contractor, he spoke to the pool guy; he delivered in the case of the contractor, Mr. Mentes, money in cash for the house. I don't think it was the whole price, but a good part.

Now, is there anything criminal in your experience, ladies and gentlemen, about a son doing legwork for his

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parents?

I asked Mr. Nussman, the Government's witness, about it, who is a lawyer. I said, "You sold land before, you have had a lot of land deals, wills and all sorts of things like that, like all lawyers do." I said, "It isn't unusual in your experience, is it, when parents are elderly, for the son to do a lot of the running around or for you to talk for him and handle the problems?"

No, this wasn't the first time and it wasn't the last time it happened.

Because let me tell you, ladies and gentlemen, if the Government is saying it is a crime for a son to be running around doing some legwork for his parents, a lot of us are in trouble in this country and we don't even know it.

Now, did you hear a single Government witness testify that they were told by Gil Fisher, Jr. that he bought the house, his parents did not buy it?

Did you hear a single Government witness testify that they had a conversation with Lulu Fisher and she told him, "I am not buying the house,my son is buying it"?

Did you hear a single Government witness testify that Gil Fisher, Sr. told them, "I am not buying the house. My son is buying the house."

No, there was no evidence like that.

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The Government has the burden of proof in this case, ladies and gentlemen.

As I have said a number of times, I just want to emphasize it because it is important and it is fundamental, they have to prove their charges beyond a reasonable doubt. They just cannot come in here and say, "Gee, it is suspicious because somebody paid some cash."

That is not anything. They cannot say, "Well, it is probable than not."

They have got to prove their charges. They cannot shift the burden of proof to a defendant. It is their burden. That is why it is a criminal case. This is not a civil case. This is ot a case involving payment of taxes. That will come some time.

This is a criminal charge. This is serious. That is why they have to have a more serious burden of proof than if they were just wondering about back taxes or something of the sort.

Since the defendant doesn't have to prove anything, we could have sat back here and said the Government hasn't put a witness on to say any of these things. We could rely totally on the absence of the evidence.

But we didn't play the game that way. We put his aunt on the stand, 84-year old woman; Mr. Feinberg was

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courteous enough to allow her testimony to be read in because she is an elderly woman, it was not that easy for her to come down to court. We read her testimony in this morning, Aunt Janie Foy, and she told you, she told you that the money for the house came from the late Mr.Fisher -- this young -- everyone calls him Junior -- he is 56 - but his father and he himself had been involved in numbers over a number of years and he had accumulated a little money. He had accumulated a fair amount of money, a big bag of it, or something, and that was the money that was used to pay for the house.

Then you heard Mr. Feinberg read his cross-examination of her and he didn't lay a glove on her. She did not turn out to be a perjurer. She didn't turn out to be a tax cheat. She didn't turn out to being paid for her testimony in any way, shape or form either, through not being prosecuted or anything like that. She just turned out to be a woman. She wasn't any John Singleton or Rosalie Fisher.

I suggest to you that-- as I said, we don't have to prove that, we put it in anyway. It puts a total lie to the Government's theory.

Now I would like to talk a little bit about the Government's theory in this case. I told you,once again,

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in my opening statement, that the Government would not introduce a piece of paper which would show that during 1967, 1968, 1969 and 1970 that Joe Blow or Sam Smith of Lenox Avenue or Manhattan Avenue or any place gave money from numbers to Gil Fisher.

A normal record shows somebody earns money; record books, receipts, nothing like that. You didn't see anything like that. No evidence whatsoever. Not a single document in this case that shows that.

With all these wonderful pieces of paper that the IRS put in here, did you see a single piece of paper like that which says on April 27, 1969, I lost $10,000 to Gil Fisher playing the numbers?

There wasn't anything like that.

Or I owe you, Gilbert Fisher, $10,000 for money lost in numbers? No IOU's, no notes, no nothing.

Also you did not hear testimony, at least to my recollection, from a single witness from Harlem, where Gil Fisher runs his variety store, a single witness come in here and say that either. You did not hear a witness come in and say, "Hi, my name is Joe Smith, I live up on Morningside Drive. I played the numbers in 1967 with Gil Fisher and I won occasionally and I lost $10,000. On another occasion I won $2,000 and overall he won $20,000 from me."

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That is the normal way to prove a case.

You never heard anything like that. There wasn't any evidence like that.

Don't you think if that is what has really happened, the Government would have produced a document or a witness to substantiate that?

You have heard about all the prosecutors, the IRS agents who have worked on this case, the Assistant United States Attorney Feinberg, Assistant United States Attorney Rakoff, Special Agent Boltja, Special Agent Spadola, Agent Buckley, Agent Jones, Agent Bruh, Agent McElroy, a whole squad of agents -- don't you think that the United States Government, with all these Internal Revenue Agents and with all the power and majesty of the United States Government could have produced one witness to say these things if it happened? One witness?

So instead, and because they don't have a witness to say that, they come in here and, of course, they have no direct evidence that anything like that happened; the Government gives you a theory.

This prosecution is not based on direct evidence of those things. It is based on a theory.

This was made plain yesterday by the testimony of Agent Spadola. Let me reiterate, Mr. Spadola is an honest

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man. He is no John Singleton, he is no Rosalie Fisher. He is an honest man, doing his job, a good public servant. He works hard. His job is to help construct a theory to try and make this case sell.

He told you about the Government's expenditures theory. See what they did was they counted up, we have the charts, every expenditure that was made by Rosalie Fisher for the whole period and every expenditure that was made by Bernice Duncan, now Fisher, throughout that whole period and every expenditure relating to the house in New Jersey throughout the whole period, added them all up, counted them as expenditures, poof, they became income to Gil Fisher.

Now, Agent Spadola made up a bunch of charts to support this theory. These charts, as his Honor instructed you, are not independent evidence of anything. They are only supposed to reflect the evidence in this case.

Agent Spadola testified that they only supposedly reflected the exhibits in evidence in this case. In other words, they are an interpretation, a contention based on the exhibits in evidence.

That is the Government's theory. It is its argument. Except Agent Spadola, he honestly and candidly admitted on cross-examination, that this chart was actually

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also based on things that were not in evidence, based on his belief of what certain witnesses would say on the stand here even though, because he frankly conceded he never had seen them tesify or read their testimony.

It was his belief, he thought they might say something like that.

Now Agent Spadola's theory, as I said, was to charge Gil Fisher with everything. Whether or not there was a piece of documentary proof, -- you remember he is supposedly relying--he wasn't relying on testimony, he said. "I did not rely on testimony." That was the question and answer I asked him- "I relied only on the exhibits."

He charged Gil Fisher with every expenditure even though there was no pieces of paper or documents to show he made the expenditures.

For example, every expenditure of Rosalie Fisher, including such personal expenditures that she made, some five, six years after they split up, Better Homes and Gardens Magazine and cleaning her fur coat and all sorts of things like that. Charge them to Gil Fisher. That was the rule of thumb.

He also charged every expenditure made by Gil and Lulu Fisher for the house in Englewood. That was charged to Gil Fisher, Jr. even though the documents in

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evidence, remember there was a chart and he had the exhibit numbers, and he said these are the exhibits he relied on for this.

We started going through them; all the documents in evidence there showed, and the ones he supposedly relied on that these were expenditures of Gil Fisher,Sr. and Lulu Fisher, ignoring the plain face of the documents, and charged it to Gil Fisher even though the documents say differently, even though the documents were drafted by an honorable and honest upright lawyer named Aaron Nussman.

They were not drafted by Mr. John Singleton.

Thirdly, he charged every expenditure of Bernice Duncan that they could ever find, charged to Gil Fisher. Again even though there was no evidence that he paid all of these bills.

Now I tell you candidly, there is evidence in this case that some bills of Bernice Duncan he paid or parts of them or some of them. There are documents that show them. I think there is a car transaction where he either paid some or all of the money.

I don't think it is important. Whatever the figures are. There are other things which indicate he paid some things, but my lord, it didn't matter whether there was any documents or evidence under the Government's

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theory, just throw it up on a chart, who is going to care.

You remember I asked Agent Spadola about the rent. They charged as an expenditure of Gil Fisher all the rent of Bernice Duncan on her apartment throughout the whole period, although as he admitted, there wasn't a single document in here and he was making a chart solely on documents to show that he had paid the rent.

They just put it on anyway.

It is as if Bernice Duncan, before she had met Gilbert Fisher, had never been able to pay her own rent. All of a sudden, as soon as she meets Gilbert Fisher, poof, she cannot pay rent anymore.

Then she took a trip, which I think the bill is inevidence. I don't remember where it is. It is here some where, Exhibits 132 and 133, show she made a trip. Not with Gil Fisher. She just made a trip. I think it was either to St. Thomas or Florida or some place.

JUROR No. 10: Nassau.

MR. NAFTALIS: Nassau. Somewhere down in that area of the world, and she made a trip, and the bill shows that she made a trip, and she paid the bill.

There is no document in evidence that he paid for the bills, but once again, Mr. Spadola said, "Under our theory, we charge him with everything."

Now, ladies and gentlemen, isn't this a little bit like Alice in Wonderland? Anybody who spends a nickel, Gil Fisher is responsible, even if you don't have the evidence to prove it, just put it up on the chart. Who cares?

This theory of the Government's and this theory of Mr. Spadola's might be fine if we were all sitting around in an accounting class and having a seminar on accounting theories or theories of taxation or new developments in income taxes, and we had a whole bunch of scholars sitting around and making judgments: What is a good theory, and what is not a good theory. But this isn't an accounting class. We are not at Harvard Law School or any place like that.

Shouldn't the Government have to prove more than just simply concot a theory and therefore brand somebody guilty? Shouldn't they have to do a little bit more in a criminal case? Shouldn't the United States of America with all the agents who worked on this case, with all its power and all its majesty and all its wisdom, be compelled to put in a little evidence in the case before they want to brand somebody as a criminal?

You remember also that Agent Spadola's theory was a pick-and-choose operation. Pick the exhibits that helped

him. Ignore lthe exhiits that hurt the theory.

One exhibit he ignored was Exhibit 68A and that is the Nevada divorce transcript and I am sure you will hear Mr. Feinberg refer to it because he is going to refer to it and make arguments from it, and so on and so forth, and he is going to pick and choose in that transcript also.

Well, I am going to accept this part, but not that part. We offered it all as an exhibit.

In that Nevada divorce transcript in 1972, Mr. Fisher points out that he had given Rosalie Fisher some $193,000 in the period prior to any of the tax years involved here and I asked Agent Spadola what would happen, what would be the effect if you had cash on hand,to the Government's theory.

Could I have that chart for 1967? Thank you.

I don't need the stand. I will just show it to the jury.

I asked Agent Spadola,"Isn't it correct that in doing your chart for the Government's theory, that you take into account cash on hand during the period," and he said,"That is correct."

So I said to him, "Therefore, if you have cash on hand, that reduces the amount of expenditures and therefore reduces the amount of possible taxes, income, because under

the Government's theory and concept, you take away the income and the sources of income from the expenditures and so on.

He even lists cash on hand here, and they magnanimously give Mr. Fisher credit for $1,000.

I said, "Suppose there had been $193,000 cash onhand, what would happen?"

He said, "That would wipe out the entire tax liability for that year and would be a carryover that his wife maybe used to wipe out the liability in other years."

Under his theory, that is all we are talking about here, the Government, if that were so, and had Agent Spadola considered that fact, the Government would owe Mr. Fisher money in 1967, but he didn't consider that fact and he admitted that on the stand.

Really, it seems like the whole Government's chart is a kind of a shell game. What is good is considered. What isn't good is ignored.

All the documents on the house which theyput in evidence which hurt their case, they ignored.

Exhibit 68A is ignored. They don't bother looking into Rosalie Fisher's safe deposit box. Only the things that help them are put on.

It is like the old shell game. Indeed maybe the

best way to characterize the Government's theory in this case is because they are trying a gambler, maybe we will try it under the rules of Las Vegas, because the house always wins; when they do this chart, the Government always wins on this chart, no matter what the figures are; the Government wins.

Losses are not considered. Loans are not considered. Gifts are not considered. Only the things that are good are considered.

Now, I have summarized the lack of evidence in this case and I suggest after you reflect on that, you will find that the Government has not sustained its burden of proof. We are relying on the weakness of the Government's case here.

Mr. Fisher, because of that, chose not to take the stand.

Judge Weinfeld will instruct you that a defendant is not obliged to testify in a criminal case or put in any proof and that cannot be held against him. Only the Government is obliged to put in proof and they have the burden of proof.

Now, one other thing that also bothered me, I suppose, a bit, is that you might be influenced in some way by the personality of the lawyers in this case, as you

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sit here and pass judgment on that human being sitting over there at the table.

If I have done anything, and I say this very sincerely, throughout any part of this case, which has in any way offended you or gotten on your nerves or got you mad, blame me for it. Blame it on my inadequacies. Don't hold it against this man. Don't blame him for anything I may have done that offended you.

Similarly, I think you have seen Mr. Feinberg here and I am sure you will agree with me that he is a fine, aggressive, able, zealous, skillful prosecutor. He did a terrific job in prosecuting this case, but don't decide this case, don't convict a man of a crime because you like Mr. Feinberg.

Because, as I have said, Mr. Feinber, he is just like any of us here. He doesn't know anything about the facts of the case. He is not a witness to what happened.

All he knows about the case is what you know about the case. It is what his witnesses have said. He knows no more or less about it and his case is no better and no worse because he is trying it than the evidence in the case.

Mr. Feinberg gets good cases to try sometimes

and sometimes he gets bad cases to try.

We have heard some testimony from used car dealers; used car dealers handle lemons;and I am afraid Mr. Feinberg has a lemon on his hands here, but it is a lemon which is not very laughable from the standpoint of Gilbert Fisher.

My time is almost up and I only have a couple of more minutes and I probably have spoken a little too long and may have tried your patience, but, ladies and gentlemen, we are dealing here with probably what I regard as the two most precious things in the world. We are dealing here with human freedom and we are dealing here with human reputation and it is difficult to discuss iether one of those things briefly or casually.

In a couple of weeksthis case will be a very dim memory to you. You will have gone on to other things. His Honor will, Mr. Feinberg will, and for the Internal Revenue Agents, there will be new investigations, new challenges, but what you do in this case will forever mark the course of whatever future is left for Gilbert Fisher.

Yours is a very awesome responsibility and as a result, the prosecution must meet a rigid and exacting standard; beyond a reasonable doubt.

Each of you must be satisfied in your own minds beyond a reasonable doubt that Mr. Fisher is guilty as charged.

If you have a doubt that is based upon reason, it is your sworn duty, your sworn duty, to return a verdict of not guilty.

One last word. Mr. Feinberg tried this case with great skill and great zeal and fervor and resourcefulness, and what I say now is not meant in any way to be critical of the fine job he has done. He is an absolutely superb character.

A few years ago, I came upon an inscription in the courthouse and it is the oldest courthouse in all of England where I guess our common law is supposed to come from and the words on that courthouse I have never forgotten.

"In this hallowed place the Crown never loses because when justice is done the lowliest subject, the Crown wins."

I say to Mr. Feinberg, my friend at the prosecution table, that the United States never loses in a criminal case because when justice is done to any man, to any one of us, the United States wins.

I think the greatest and most rewarding experience

that any human being can have in this world, the most fulfilling and satisfying experience, is to relieve the pain of another human being.

Gilbert Fisher has lived with the anguish and turmoil of suspicion of charges, investigation, of indictment and I say to you, ladies and gentlemen, the time has come, the time has come for an American jury of citizens to say, "Enough, enough," and at long last to return the verdict of not guilty that this man deserves.

I respectfully submit Mr. Fisher's case and his faith to your hands and ask you for a verdict of not guilty.

Thank you.

THE COURT: Members of the jury, we will take a five-minute recess and immediately thereafter Mr. Feinberg will sum up.

Please remember when you go into the jury room, that the case is not yet submitted for your consideration and please do not discuss any aspect of it. I am just giving you a five-minute stretching period.

(Recess.)

(Luncheon recess.)

(Jury in the box.)

MR. FEINBERG: If it please the Court, Mr. Foreman, ladies and gentlemen of the jury, Mr. Naftalis:

As you know, during Mr. Naftalis' excellent summation I didn't interrupt him at all. I made no objection. This of course, does not mean that I agree with everything Mr. Naftalis said during that summation.

Quite obviously there is a great deal that I take issue with, but there is a custom in this courthouse of not interrupting a member of the same profession during his summation.

You will recall that at the outset of this case the most important statement I made to you was to use your common sense. I said that lawyers might make statements, that things might be said from the bench or from witnesses, that the crux of this case depended on your using your common sense, and I believe that you can see now why common sense is so crucial in this case. Because if there ever was a case where there were irrelevant issues brought into play, where there were smokescreens raised, where there was a lot of irrelevant thunder, this is the case.

The question here is not whether Rosalie Fisher is guilty or not, or John Singleton, or Aaron Nussman, or

Eugene Mentes, or anybody. The question is: Is this man involved? Is this man on trial guilty?

The answer is, of course he is.

There have been a great many smokescreens raised by the defense. It does not make any difference whether it's checks or cash? Of course, it makes a difference. When you pay in cash there is no record, there is no receipt, there is no recording. You give a man money in a brown paper bag, that's it (indicating). No records.

Of course it makes a difference if you pay in cash.

Another smokescreen: Aaron Nussman. Very good attorney. Took all these documents about the house in Englewood, thought that Lulu Fisher and Gilbert Fisher , Sr. were the true owners of the house in Englewood. Aaron Nussman was fooled in this case. Fisher fooled Nussman. Fisher fooled everybody in this case. A man who is a tax cheat, a man who evaded taxes, doesn't go around and broadcast to the world.

The defense would have you believe that these documents should be accepted at their face value. That's the whole point here. They can't be accepted at their face value.

You heard the testimony. Mr. Fisher had a scheme and he fooled Mr. Nussman.

He fooled the contractor. Sure the agreement says Gilbert Sr. and Lulu Fisher. Of course, that's the whole point.

Today he stops fooling everybody. Today the buck stops here in this court with you twelve jurors.

What happened in this case? Gilbert Fisher was a gambler, one of the best, to use his own words. And, ladies and gentlemen, what Mr. Naftalis and what I say in this summation is not evidence. But periodically in this summation I'm going to point to evidence.

This divorce proceeding, 68A, Mr. Fisher's own testimony, not mine, not Rosalie's, not Singleton's, his own. Now, what happened here?

Gilbert Fisher was a gambler, page 48, line 27:

"At one time you were a good money-maker; is that right?

"One of the best."

"How long ago was that?"

Now, this is 1972 that this transcript takes place, that Mr. Fisher is testifying. In 1972 here's what Mr. Fisher says:

"How long ago were you one of the best money-

makers?"

"Well, this was up until approximately three years ago, approximately '68 or '69."

There Fisher is saying this.

"Q What happened then?

"A Well, as things go, I'm a gambler and you begin to have an awful ot of trouble and we closed down the business. We closed it down temporarily. We opened it again and we closed on October 8, 1970."

Right at the end of the fourth year in this case.

His best years, '68 and '69. I don't say it. He says it.

He literally, ladies and gentlemen, made a fortune and he didn't report it. He spent it right and left through other people.

In 1972 he is divorced from Rosalie Fisher and everything comes out.

If you have any problem, ladies and gentlemen, with this case, the very first thing you should do in that jury room is ask the Court to send in 68A, the divorce proceeding, and you can read it for yourselves. This document buries the defense in this case once and for all.

Now, Mr. Naftalis says that the government's

whole case here is a theory that there is no direct evidence. Well, ladies and gentlemen, you saw these documents.

Never mind the testimony for a moment. We'll look at some of the documents now. Is that a theory? Those are hard, cold evidence -- hard facts of what happened here.

Because, ladies and gentlemen, despite all the thunder of Mr. Naftalis, a very able guy, did a good job here, but despite all the thunder of Mr. Naftalis, what Rosalie Fisher says, indeed, what Nussman and Mentes and the maid and all these witnesses say, really is secondary to what these documents show, these exhibits.

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These exhibits, just like this transcript, are the real key in this case because exhibits don't lie. You can look for yourselves. There is no credibility issue. Look at the document and see what it says.

I will show you what I mean in a moment.

This case has five aspects to it, and I am going to go into each one just briefly. The five aspects go like this:

Point number one, Gilbert Fisher makes money as a gambler. He says so. That's quite clear. Indeed, it is conceded. He makes money as a gambler, and he proceeds to spend the money through Rosalie, spends the money himself, spends it through Bernice Duncan, and spends it through his folks. That's the case. He makes the money and he spends it through these four individuals: Rosalie, himself, Bernice, and Gilbert Fisher, Sr. or Lulu, Fisher, his folks.

Let's take them separately.

Point number one: he makes the money. We have already seen that that's not really an issue here. That's not really an issue here. He is a gambler, a good one, one of the best.

He also makes a certain amount of money from two houses in 1965 which he buys with Rosalie. Some

separation in 1964! In 1965 he buys two pieces of real estate.

In 1965-1966 they buy the Esplanade Garage and sign for it. Some separation!

In 1969, when he is one of the best gamblers around, he gains access to the safe deposit box. Some separation! He walks in with Rosalie, Rosalie signs the power of attorney, he signs the power of attorney, and they both have access to the box, whatever is in it. Some separation in 1964!

Rosalie testifies that she knows all about the gambling operation; she takes the envelopes from the gamblers that are betting; gives the money with the envelopes to Mr. Fisher. That's the way the system works. You heard Rosalie's testimony.

Now, Mr. Fisher proceeds -- here's the second part now -- to spend the money through Rosalie. We have heard a lot of thunder from Mr. Naftalis here about Rosalie wanting to bury Mr. Fisher. Rosalie is upset with Mr. Fisher. She has an axe to grind. Well, the evidence shows otherwise, ladies and gentlemen.

Rosalie Fisher is no angel. Sometimes the government has to put people on the stand in order to convict the guilty, and that's what we had to do in this case.

Rosalie Fisher is an important witness. The government cannot always rely on men like Aaron Nussman and Eugene Mentes. Sometimes the government has no choice if justice is to be done.

How does Gilbert Fisher go about spending money through Rosalie Fisher? I will show you something. Some separation! Rosalie has an axe to grind; is that right?

Well, here, in 1970, Rosalie Fisher is spending money from Mr. Fisher's life insurance policy. Some separation! Mr. Fisher knows nothing about this? It is his policy. She is paying the premiums for him. Here are the checks (indicating). Some separation!

Here is a health insurance policy. More checks. She is paying for him. This is not her policy, it is his. She has an axe to grind? He knows nothing about this? Here are the checks, 41. Look at them in the jury room.

Government Exhibits 25, 26 and 27 in the years in question. Rosalie is depositing money in bank accounts, not just her accounts. Three of them belong to Gilbert Fisher. The New York Bank for Savings, this is good. Rosalie Fisher depositing money in a bank account of Gilbert Fisher, in trust for his two children in New Jersey.

Rosalie is doing the depositing. Some separation! Mr. Fisher doesn't know anything?

Here is a second bank account at the New York Bank for Savings, not Rosalie's, but Mr. Fisher, in trust for his other son, Gilbert Fisher, Jr. Rosalie is doing the depositing. Some separation! Mr. Fisher doesn't know anything?

(Continued on next page.)

Some axe to grind!

A separate bank account for Gilbert Fisher, at the Carver Bank for Savings as late as 1970. Rosalie is doing the depositing for Gilbert Fisher. He doesn't know anything? He is oblivious to what is going on? Some separation!

Rosalie may be stupid, Rosalie may be stupid; the documents are clear, however. This man knew how stupid his wife was. He knew exactly what he was doing when she wheeled the money to the bank, the change in a cart, because it was too heavy.

Rosalie is no angel, but Gilbert Fisher knew what was going on here. Here's three bank accounts of his and it was Rosalie that was doing the depositing.

Some axe to grind!

What else did Gilbert Fisher do for Rosalie? How else did he spend money through Rosalie? Let's let Mr. Fisher speak for a minute. In Nevada , page 49, line 25:

Mr. Fisher is asked, "Do you remember giving Mrs. Fisher a Cadillac in 1967?

"A No, sir.

"Q 1969?

"A Yes, sir.

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"Q Do you remember giving her $5,000 then?

"A Yes, sir.

Some separation!

Here's the invoice for that Cadillac, Exhibit 36. Sold to Rosalie Fisher. You see, ladies and gentlemen, no mention of this man. No mention. Rosalie Fisher. There is nowhere on this invoice any mention of the fact as to who bought that automobile; and how do we know he bought the automobile? I don't say so. Mr. Naftalis didn't say so. Mr. Fisher says so in Nevada but he did hide it well, because on that invoice not a word, not a signature, nothing.

Now, that takes care of number one, the gambling.

And number two, the fact he spent through Rosalie.

Third, he spends through himself. How does he do this? Well, first of all, ladies and gentlemen, here are ten or eleven exhibits, Government's Exhibits 111 through 122. No theory -- documents. For what? Bernice's variety store. No Rosalie now. Forget Rosalie. Forget Singleton; forget all of that for a minute.

Here is not quite a dozen documents in which Mr. Fisher is buying goods for the store, Bernice's.

Cash registers, fences for the store, items, $16,000 worth of goods in 1970 from one company.

There is no one involved in these documents but Gilbert Fisher. He is spending the money, cash sometimes. Some of these are checks. Mostly cash. No records.

Gilbert Fisher is the only one involved in these records. He spent the money and he can't pin this on anybody else.

But that's not all. It's also interesting to know just in passing with Bernice's variety store, take a look at Government Exhibit 71. Who's working for him? Bernice Duncan. Bernice Duncan is working for him.

That's not all.

Still on part three, Mr. Fisher is spending for himself: Government Exhibit 106, to Gilbert Fisher, 470 Lenox Avenue, 1968 brand-new Cadillac. There it is, cash!

How do we know that, even -- aside from the fact it says Mr. Fisher here, how do we know that he also paid for it? Lift up this invoice. Signed, Gilbert Fisher, 1969 Cadillac. He bought it. He paid for it, cash. No one else.

That's not all.

108, 1969 Cadillac. The other was '68. Gilbert Fisher, 470 Lenox Avenue, brand-new Cadillac, vinyl roof, leather upholstery, head restraints, five whitewalls, stereo radio, AM, FM, soft ray glass, six way front adjustment, two-door edge guard, power door locks, seat back recliner, rear window defogger. $7,448.35, cash $1,600, the rest the trade-in on the other one.

How do we know it's Gilbert Fisher? Here's the signature, cash deal (indicating). Here's the deposit slips, cash.

No records. Nice and quick (indicating).

So now we have Gilbert Fisher once in a while slipping up and buying on his own, not through somebody else, butalways with cash, because with cash there is nothing, no records (indicating).

What's the fourth part of the case? Spends through Bernice Duncan.

Now, of course, Mr. Fisher says in Nevada on page 28, "Who lives in that home in New Jersey besides yourself?

"A Myself, Bernice Duncan and the two kids.

"Q And yourself?

"A I don't live there. I maintain a home for Bernice Duncan, the mother of these two children."

I don't say that and Mr. Naftalis didn't say it. Mr. Fisher says it.

"I maintain a home for Bernice Duncan and the two children."

What else did Mr. Fisher do for Bernice Duncan? Well, of course, we always have these automobiles. Mr. Fisher bought a new automobile whenever the ashtrays were filled up in the old one.

109, sold to Bernice Duncan, 470 Lenox Avenue, a 1970 Chrysler Town & Country green station wagon. Now, you might say, sold to Bernice Duncan: What does that have to do with Mr. Fisher? Pretty simple; lift up the invoice. Receipt, Gilbert Fisher, $4,014.83. Gilbert slipped up on the receipt on this. That's 109, direct evidence. No theory. This is evidence.

110, automobile invoice, 1969 Mercury Cougar sold to Bernice Duncan, 470 Lenox Avenue. Cash. $3,786.25. Lift up the invoice. Gilbert Fisher, a Christmas present, December 24, 1968. Slipped up here (indicating). He's the purchaser.

107, 1970, buys a Jaguar for Bernice Duncan, 470 Lenox Avenue, New York, New York. $8,141.70, cash.

And you recall the testimony of Mr. Gonzalez, that the both of them came in that day.

Now, what has Bernice Duncan put down here besides this as a cash transaction? She is asked to put down her employer's name and she puts 446 North Woodland, Englewood. You heard the testimony of Mr. Gonzalez. 1970 Jaguar.

(Continued on next page.)

2pm

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Now, what about the rent at 470 Lenox Avenue? Well, ladies and gentlemen, first of all, way back in 1961, when Bernice Duncan first rents that apartment, who sends in a letter of recommendation to the landlord telling the landlord that she is a good, honorable,upright woman? Gilbert Fisher. Back in 1961, 129A, there is his signature.

She is living at 470 Lenox Avenue and what does Gilbert Fisher put down for his address for all the cars that he buys? 470 Lenox Avenue.

What does Gilbert Fisher say in Nevads as to his address? 470 Lenox Avenue.

Finally, ladies and gentlemen, the fifth part of the case, spending money through his folks.

Mr. Naftalis and the defense wouldhave you read these documents at their face value. That was the whole point in this case. That is why he did it the way he did it, so that he wouldn't get caught, so that it would be nice and look pretty.

But it won't wash. Why won't it?

Well, let's start off with the testimony of certain witnesses. Mr. Nussman.

Mr. Nussman testifies from this witness stand that Gilbert Fisher walks in and gives him $13,000, $14,000,

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$15,000 in cash in a brown paper bag.

Mr. Nussman testifies that he deals with Mr.Fisher; that he only saw Mr. Fisher's father and mother on one or two occasions.

When there's problems about the construction of the house, when something has to be done, it is Mr. Fisher who comes to see Mr. Nussman.

Mr. Fisher pays the amounts to Mr.Nussman. And when it comes time for a legal fee to be paid, it is Mr. Fisher who pays that fee, $1,000.

Of course, Mr. Nussman did not know what was going on. One who evades his income taxes, one who cheats on his tax returns, doesn't go and broadcast it to the world. You don't let anybody know anything they don't have to know. Nice and clean. Nice and clean. And Mr.Nussman, just like anybody, fell for it. Why not?

Eugene Mentes, the contractor. He is riding a bulldozer on the construction site, up walks Mr. Fisher, gives him $13,000, $14,000 in a brown paper bag as a payment for the house at the site. Not in the office, right at the contract site, where they are building the house.

Mr. Mentes testifies he takes the money and Mr. Fisher says to him, "You don't have to count it, it is all there, just go to the bank." Nice and clean. No records.

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That is supposed to be from his folks who are on Medicaid? Ridiculous.

Mentes testifies, ladies and gentlemen, he deals with Gilbert Fisher,Jr. That is the man who he deals with. That is the man who spotchecks the job. That is the man who gives the cash in the bag. Not his father and mother.

Then there is Leonard Reynolds, a very quick, minor witness. He gets a call, goes out to the house. Who is there? Mr. Fisher wants a swimming pool. $7,000 pool put in. Mr. Reynolds writes out the contract, gives the pen to Mr. Fisher.

Mr. Fisher says, "I will be back. I will give you a call. I have got to go take the contract and get it signed."

He leaves the whole area and a week or two weeks later, they meet again,and it is now signed with a check for the pool.

Mr. Reynolds never ever saw Mr. Fisher, Sr. or Lulu Fisher. All through Mr. Fisher, Jr. But Mr.Fisher doesn't know anything about these expenditures and Mr. Fisher is just doing it for his folks,and Mr. Fisher is just doing it for Miss Duncan, and Mr. Fisher is just doing it for Rosalie.

Mr. Fisher knew exactly what he was doing. He was

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a gambler and he knew the best way to beat the odds. The best way you beat the odds is to use a wife, who isn't too bright, an accountant, who isn't too swift, your mother and father, who are 80 and 83 or 77, and Bernice Duncan, who you are living with in New Jersey with the two kids; use them, no one's the wiser except Mr. Fisher.

It is no crime, as Mr. Naftalis said, he is absolutely right, it is absolutely no crime for grandparents to buy a house for their grandchildren, but it is very definitely a crime to evade income taxes the way that Mr. Fisher evaded income taxes in this case.

That is a crime.

Don't be fooled, ladies and gentlemen, and I am sure you won't be, by the face value of these documents. They don't mean a thing. That is the whole scheme in this case, to fool anyone who would look at those documents into thinking that the mother and father owned the house and built the house.

Do you remember the maid? One of the last witnesses? She goes to the house Mondays to clean up. "Did you see Bernice there?" Yes. "The two kids?" "Yes." "Gilbert?" "Yes." "His father and mother?" "No." I never saw them.

Money in drawers, cars in the driveway, three or

four. "I never saw them." "I saw the parents with the kids and the money in the drawers."

He doesn't know anything about it.

Now, for just a few minutes, I want to talk about some of the smokescreens that have been raised in this case, but before I do that, let me just say, what does Mr. Fisher say about what went on out in New Jersey.

Well, we have got his testimony in evidence. Page 28, line 25.

Mr. Fisher under oath in Nevada:

"Q Did there come a time when you had that home built in New Jersey?

"A No.

"Q You had nothing to do with the building of that home?

"A No."

Page 31, about the New Jersey home, Mr.Fisher under oath:

"Q Do you know that your mother and father provided any funds for the building of that home?

"A Do I know whether they did or not?

"Q Yes.

"A They provided all the money.

"Q And you don't know where those funds came from?

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"A I don't hae the vaguest idea."

Presposterous.

Page 51, Mr. Fisher speaking, lines 23 to 30.

"Q Is it a $100,000 house in New Jersey?

"A No, sir.

"Q What did it cost?

"A I don't know.

"Q How do you know it wasn't a $100,000 house?

"A Well, I just say it wasn't.

"Q You just say it wasn't. What about the neighborhood, is it a good neighborhood?

"A It is nice."

He doesn't have the vaguest idea under oath.

Now, there has been a lot of smokescreen and a lot of thunder in this case, a lot of thunder. Let's just deal for a few minutes with the thunder.

Point No. 1: The father and mother provided the funds. That is one theory. Well, let's see what Mr. Fisher says about his father and mother on page 29, line 24.

"Q What kind of work has your father done, sir?

"A My dad doesn't work.

"Q When was the last time he worked, do you know?

"A I don't remember.

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"Q And your mother, when was the last time she worked?

"A I don't remember."

Page 48, line 17, Mr. Fisher speaking, not me and not Mr. Naftalis:

"Q Are your parents alive?

"A Yes, sir.

"Q What are their ages?

"A My mother is 77.

"Q And your father?

"A My father is 88.

"Q Was there a time when you helped in their support?

"A Oh, sure."

'When you helped in their support.' 'Oh, sure.'

"A When I was a good moneymaker.

"Q At one time you were a good moneymaker, is that right?

"A One of the best."

That is Mr. Fisher speaking.

Let's not forget that Mr. and Mrs. Fisher, Sr. and Lulu are on Medicare. They are old people. They are sick people. They are frail people. They are building homes in New Jersey.

So much for thunder No. 1, the father and mother

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provided.

"My dad is an elevator operator. That is what Gilbert Fisher says in Nevada. He is an elevator operator. $50,000 home, $7,000 pool, $5,000 worth of furniture, landscaping, $1500, maids on Mondays. Money in drawers. Don't know anything.

Now, thunder No. 2. Theory No. 2, Smokescreen No. 2. Maybe Bernice Duncan had the money.

142 in evidence, Bernice Duncan filed no tax returns for 1967 through 1970. She didn't pay any taxes. No theory. Proof.

Well, maybe she was working.

143 in evidence. HEW says that during the years 1967 through 1970, she never even paid any Social Security taxes, no withholding, nothing. In fact, according to the Department of Health, Education and Welfare and the Social Security Administration, the last time Bernice Duncan ever paid anything in withholding was in 1961 when she paid the grand total of approximately $1600.

And let us not forget who is buying Bernice Duncan the automobiles. And who is supporting Bernice Duncan in New Jersey. Let us not forget that Bernice Duncan herself says in filling out the application to send her kids to private school, "What do you do? What is your

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job?" "Housewife."

So much for Bernice Duncan and the smokescreen that maybe she provided the money.

That takes care of the second smokescreen.

It is not what I am saying and it is not what Mr. Naftalis is saying. It is what the documents say. It is the documents that don't lie.

The third thunder, more thunder from the defense. Maybe the money was earned prior to1967. Maybe this was some sort of cash that Mr. Fisher had on hand.

Well, first of all, Mr. Fisher says out in Nevada and I won't read it again because I am sure you recall,"I was one of the best, mainly approximately three years ago."

MR. NAFTALIS: I object. That is not what he said.

MR. FEINBERG: All right, I will read it.

MR. NAFTALIS: I would appreciate it.

MR. FEINBERG: I will read it.

"Q At one time you were a good moneymaker, is that right?

"A One of the best.

"Q How long ago was that?"

This is in 1972.

"A Well, this was up until approximately three years

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ago.

"Q What happened then?

"A Well, as things go, I am a gambler and you begin to have an awful lot of trouble and we closed down the business. We closed it down temporarily. We opened it up again and we closed it on October 8, 1970."

Now, are we to believe that Mr. Fisher wasn't making any money in 1968, 1969 and 1970? He is one of the best, he says so.

What is he doing with this money? This is the money, ladies and gentlemen, that he is spending through Rosalie and Bernice and his folks in New Jersey.

This is the money he has given to Mentes. This is the money he has given to everybody. These are his good years, the firm years.

How do we know this? Well, that is not the only thing. As I said before, in 1969 Mr. Fisher decides that he needs to get into the safety deposit box. In 1969, that is just around the same time as when he said in Nevada, so he gets a power of attorney to get into the safety deposit box in 1969, right smack in the middle of the charges in this case.

He signs and gets in. This doesn't say prior to 1967. This doesn't say 1964 or 1965. 1969 he needs some

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cash. He wants in.

It meakes sense, perfectly logical."These are my good years, here's my power of attorney."

But that is not all. We can dispel this argument some some other way as well.

In 1967 through 1970 Rosalie Fisher is putting an awful lot of money into the bank for Mr. Fisher, putting in an awful lot of money in the bank in the years in question here, 1967 through 1970.

I am not talking about 1964 and 1963 and 1965. 1967 through 1970. Mr. Fisher has an awful lot of money being deposited in his bank accounts. It is money he is making in those years and he is putting it in the bank and he is spending it.

That is not all.

Let's dispel this theory at little bit more. Government's Exhibit 74 in evidence, dated 1970. Mr.Fisher goes to his bank, the New York Bank for Savings, and withdraws $39,000 in 1970. 39 grand. Government Exhibit 74.

Now, what about the safety deposit box? More thunder. More smokescreen.

First of all, that safety deposit box is completely irrelevant to this case. Why? Well, first of all, it is

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only Mr. Fisher and Mr. Fisher alone that says that there was $193,000 in that safe deposit box. There is no testimony, I mean there is no proof of that. That is Mr. Fisher saying that in Nevada.

But, ladies and gentlemen, even if there was $193,000 in that box, Mr. Fisher says that that money that was in that box never left that box, in Nevada.

Here's what Mr. Fisher says in Nevada. Uncorroborated, this is his own statement, but here's what he says, in 1972.

"Well, I had a total of $193,700. This money was in a safe deposit box in her name. It was always my opinion that I never had to be vociferous or belligerent about that money because I always thought that any time I wanted my half of the money, I could get it. There wasn't any worry in my mind that I was going to have problems getting my money."

That money, ladies and gentlemen, if it does exist, and if it did exist prior to 1967, sat in that safety deposit box. That is what Mr. Fisher wanted, that is what the discussionwas out in Nevada about that money. That money wasn't used for any expenditures during these years. That money sat there if it did exist.

The expenditures in this case came from money

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that he earned in 1967 through 1970 in gambling operations and those two houses. That is the money he spent.

Another thunder, more thunder. He did not sign the returns. Irrelevant. Absolutely irrelevant in this case.

If Mr. Fisher caused those returns to be prepared, if Mr. Fisher knew what was going on, if Mr. Fisher knew exactly how this scheme was going to operate, the mere fact that he did not sign the returns, but let his wife sign his name, that is enough.

Take a look at the indictment. If he caused those returns to be prepared, that is what is important. Listen to the judge's charge, as I am sure you will, very carefully on that point.

Smokescreen, thunder.

The final smokescreen, ladies and gentlemen, the one that I will deal with most briefly, what about all this talk about Rosalie and Singleton? What about all of Rosalie's testimony?

Well, as I have said before, ladies and gentlemen, Rosalie Fisher is no angel. Rosalie Fisher knew exactly what was going on right up to here. She said so. She knew about the gambling. She knew about the phoney bills, she knew about everything. The question, ladies and

gentlemen, is not did Rosalie Fisher know all this and not is Rosalie Fisher a perjurer. The question is, is this man guilty?

Rosalie is not on trial. Is this man guilty?

Of course, he is. Of course, he knew what was going on.

John Singleton comes across, I don't know what you thought of him, not too bright, fooled perhaps, he didn't catch on. He said that no one ever told him about gambling income. Maybe yes and maybe no. The fact is did this man know about gambling income?

Of course, he was the gambler.

John Singleton and Rosalie Fisher have absolutely nothing to do with Englewood, New Jersey, the house, construction, pools, landscaping, automobiles, Cadillacs, Jaguars, money in drawers in New Jersey.

Complete smokescreen, ladies and gentlemen. Completely irrelevant, Rosalie and John Singleton, as far as the New Jersey situation goes.

Did Rosalie Fisher know anything about Mr. Fisher sending his two kids to private school in 1970? Of course not. This was the other side of this man's life, ladies and gentlemen.

He tried to pin a lot on Rosalie Fisher, but he

cannot pin what happened in New Jersey on Rosalie Fisher.

You heard Mentes, you heard Nussman, they never even heard of Rosalie Fisher.

Of course, as I have said, some separation from 1964 when Rosalie is doing all these things for him in the years in question. Bank accounts, insurance policies, some separation.

It wasn't bitterness, ladies and gentlemen, that caused Rosalie Fisher to do these things. It was a plan. Rosalie Fisher didn't put money in her husband's bank account out of bitterness and Rosalie Fisher didn't pay her husband's life insurance policy and his health policies out of bitterness.

Rosalie Fisher did it because she was involved just as much as Mr. Fisher is involved.

In fact, one minor point - I am almost through - if this defendant, Mr. Fisher, was so upset with John Singleton and didn't know what was going on, you noticed that Mr. Fisher in 1970 goes right to John Singleton to help him prepare the books for Bernice's Variety Store.

Mr. Fisher goes to Mr. Singleton. Mr. Singleton doesn't search out Mr. Fisher.

"John,help prepare my books." Why? Well, respectfully, ladies and gentlemen, I suggest to you because

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Mr. Fisher knew that John Singleton wouldn't be able to figure out what was going on. Let Mr. Singleton do a job on Bernice's books, the way he did a job on the returns, and no one would be the wiser.

The maid. Minor witness, at the end. Never saw Gilbert, Sr. and Lulu at the house. Saw money in the drawers. Saw cars in the driveway, never saw Mr. and Mrs. Fisher, Sr.

Now, Mr. Naftalis and the defense have made Mrs. Fisher out to be a perjurer and a liar and Mr.Naftalis, of course, has the interests of his client at heart, and he is doing the best job he can.

What kind of a man is Mr. Fisher? Well, this is near the end of my summation. Let's just end with some of the statements of Mr. Fisher out in Nevada and then the facts as they really are.

Statement of Mr. Fisher in Nevada, under oath, page 27.

"Q What are the taxes, Mr. Fisher, that you paid for the home thatis located in New Jersey that is supposed to be the property of your children?

"A I don't pay any taxes."

Fact. Document. 102A in evidence. "City of Englewood. To Whom it May Concern: Please be advised

that the taxes on the property at 448 North Woodland Stret are assessed to Gilbert Fisher, Jr., Trustee, and have been paid as follows: 1967, 1968, 1969 and 1970."

Statement. Fact.

Statement of Mr. Fisher, page 28 in Nevada, under oath:

"Q Who lives in that home in New Jersey besides yourself?

"A Miss Bernice Duncan and two kids.

"Q And yourself?

"A I don't live there."

Mr. Naftalis and the defense put in two witnesses, stipulation, that said that at one point Mr. Fisher did indeed live in Englewood,New Jersey.

Mrs. Duncan in filling out the application to send her two kids to private school, on one of the applications, 448 North Woodland Street.

Statement. Fact.

Statement of Mr. Fisher in Nevada:

"Q And what are the taxes that are on this property?

"A I don't know. I don't pay them. You will have to ask my mother and father."

We have just seen what that statement is. This is another -- he was asked it twice.

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Statement. Fact.

Statement of Mr. Fisher under oath in Nevada:

"Q Now did there come a time when you had that home in New Jersey built?

"A What?

"Q Did there come a time when you had that home built in New Jersey?

"A No.

"Q You had nothing to do with the building of that home?

"A No."

The testimony of Nussman. The testimony of Mr. Mentes. The testimony of Baena, the decorator. The testimony of Leonard Reynolds on the pool.

Those four right then and there.

Statement. Fact.

Finally, ladies and gentlemen, page 51 in Nevada, line 23.

"Q Is it a $100,000 house?

"A No, sir.

"Q What did it cost?

"A I don't know.

"Q How do you know it wasn't a $100,000 house?

"A Well, I just say it wasn't."

This man negotiated that entire deal for himself, but even if you accept his theory, he knew exactly what the cost was. He paid it.

Statement. Fact.

That is the type of man we are dealing with here. That is the type of man Mr. Fisher is.

And so, ladies and gentlemen, Mr. Naftalis said in his opening that the only thing I know about this case is what people have told me.

With all due respect to Mr. Naftalis, who is an excellent attorney; these are not people, these are documents. This transcript is a document and in the last analysis in this case, these documents tell the story.

This transcript tells the story.

The issue in this case and the only issue, the only issue, on the bottom line, is this man, Gilbert Fisher, guilty of income tax evasion.

Did he know what was going on in these years?

Did he make these expenditures through other people?

The evidence is overwhelming, ladies and gentlemen, in this regard.

Common sense, common sense.

This man had money to burn and he burned it.

Ladies and gentlemen, Mr.Naftalis told you at the outset of this case that you were the United States and I agree with that 100%.

You are the United States because -- you know it is a funny thing, Mr. Naftalis talks about squads of agents that we had in thiscase and we did. We had five or six or seven agents working on this case and you can see why. $215,000 in unreported income, eighty some odd thousand dollars in back taxes owed by this man, who used a very elaborate scheme, as you have seen, or series of schemes, and Mr. Naftalis is right, we needed a squad of agents in this case.

This is a tough case to figure out, but it is simple in this courtroom, because it is presented.

Can you imagine the work that went into getting this case ready for trial? These documents? We needed a squad of agents, but, you know, all the agents in the world, all the IRS agents, all the Assistant U. S. Attorneys, all the lawyers, all the judges, at the bottom line, it really doesn't matter because the bottom line are you twelve people. You are the bottom line.

You decide guilty or innocent and you are asked to use your common sense because, you know, sometimes in cases, lawyers don't tend to use their common sense.

You decide and I agree with Mr. Naftalis and the thoughts that Mr. Naftalis said about justice and fair play.

If you people really think in this case that this man is innocent and knew nothing about this, then I agree with Mr. Naftalis, you should return a verdict of not guilty, because no matter what anybody may tell you, the Government doesn't want any miscarriages of justice in this case.

But, you see, in this case, the Government's position is that the evidence is overwhelming and that justice cries out in this case for a verdict of guilty.

That is why we are here. That is the reason and that is why you people are so important and that is why Mr. Naftalis and I thank you for the patience and the care that you listened to this case with.

It is a tough-- tax evasion is a tough crime. It is an elaborate scheme that was used here. But you people saw through it. You saw what happened here.

You know, always remember, and I am sure you will listen to the judge very carefully, that cases like this, all cases in this courthouse really, are decided on evidence, on documents, on testimony in which you are called to use your logic, your common sense, to figure it

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out.

And the evidence in this case is overwhelming. There has been a lot of thunder from the defense in this case, a lot of thunder, but you know what Mark Twain once said about thunder. Thunder is loud and thunder can be impressive, but it is lightning that does the work, and I respectfully submit to you that in this case, there is more than enough lightning sitting on this table.

This is as good a piece of lightning as you will ever see. (Indicating). This divorce proceeding, these automobile invoices, these records, the testimony of working people like Mr.Nussman and Mr. Mentes and Mr. Reynolds, that is lightning.

It is because of that lightning that the Government maintains that after you have carefully deliberated in this case and carefully weighed the evidence pro and con, that you will find that this man, Gilbert Fisher,Jr., was the real power behind all of these expenditures and you will find him guilty, as you must, beyond a reasonable doubt.

Thank you.

THE COURT: Members of the jury, we will take about a five-minute recess for the seventh inning stretch and immediately thereafter we will resume and I will

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instruct you as to the law.

Please remember the case has not yet been submitted for your consideration. We are just having a brief recess. Please do not discuss any part of the case.

(Recess.)

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Weinfeld, J.:

Members of the jury, we have now reached the point in this trial where you are about to enter upon your final function as jurors, and here you perform one of the most sacred obligations of citizenship, that is, acting as ministers of justice.

You are to discharge this final duty in a complete attitude of fairness and impartiality, and as was suggested by me at the time when you were selected as jurors, without bias or prejudice, for or against, either the government or the defendant as parties to this controversy.

Let me add that the fact that the prosecution is brought in the name of the government, the United States of America, entitles it to no greater consideration than that accorded to any other party in the litigation. By the same token, it is entitled to no less consideration. All parties, whether it be the government, corporations, or individuals, stand as equals at this bar of justice.

Up to now your duty has been, and it has been evident to me as it has been to counsel who commented upon it, to listen carefully to the testimony and follow the evidence.

Much of the testimony that was received in the

case was of a detailed nature. You have not only been attentive, but I am satisfied that you have a keen grasp of the facts and are fully equipped to carry out your final function.

Incidentally, despite the number of exhibits in evidence, I believe the issues you are called upon to decide are comparatively simple.

Your final role is to pass upon the fact issues, the disputed fact issues. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of witnesses; you resolve such differences as there may be in testimony, and you draw whatever reasonable inferences may be warranted from the facts as you determine them.

I shall later refer to how you determine the credibility of witnesses.

My function, at this point, is to instruct you as to the law. It is your duty to accept these instructions of law and to apply them to the facts as you determine them.

With respect to any fact matter, it is your recollection that governs. Anything that counsel either for the government or the defendant may have said during the progress of the trial with respect to a fact matter,

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or included in a question, or advanced in summation with respect to any fact issue, is not to be taken in substitution for your own independent recollection.

So, too, anything that the Court may say during the course of these instructions with respect to any fact matter, again, is not to be taken in place of your own independent recollection. That governs at all times.

The defendant, Gilbert Fisher, is on trial under an indictment containing four counts, or four separate charges, for violations of the federal law which makes it a criminal offense for one to willfully attempt to evade or defeat a tax due to the government, in this case income taxes.

A preliminary word as to what this case is not about. It has nothing to do with the collection of any taxes that may be due to the government. This is a criminal case. Its object is to secure the enforcement of criminal sanctions set up by Congress when it is charged that one has willfully attempted to defeat or evade the payment of taxes due. There is a distinction between civil liability imposed upon a defendant and criminal responsibility for his acts and conduct. Therefore, we are not concerned with civil liability, whether or not the taxes claimed to be due have been paid or will be paid by the defendant. This will

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not be determined by you in deciding the fact issue in this case.

So, too, you are not to be concerned that other persons who may appear to be involved in the crimes charged against this defendant have not been indicted or prosecuted. This must not enter into your deliberations, except insofar as it may properly be considered in evaluating the credibility of such witnesses as I shall hereafter instruct you.

The determination of whether charges shall be brought against alleged wrongdoers is a matter to be decided by the United States Attorney and the grand jury, and the fact that prosecutions have not been instituted against other persons who may or may not be involved permits no inference against the government and must play no part in your deliberations.

Guilt is personal. The guilt or innocence of Gilbert Fisher on the charges against him must be determined solely upon the evidence presented against him, or the lack of evidence. The case against him stands on falls on the proof against him and not against someone else.

Before we consider what the government must prove to sustain the charges, it is desirable to repeat the basic principles of law which apply in every criminal

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case and to which I made reference during the process of jury selection.

The indictment upon which the defendant is brought to trial is an accusation or a charge. It is not evidence or proof of the defendant's guilt. He has pleaded not guilty. The government has the burden of proving the charges against the defendant beyond a reasonable doubt. The defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the charges contained in the indictment. This presumption was in his favor at the start of the trial, continued throughout the trial, remains in his favor as I instruct you now, and still continues in his favor during the course of your deliberations in the jury room. It is removed only if and when you, the members of the jury, are satisfied that the government has carried its burden of proving the charges beyond a reasonable doubt.

The question that naturally comes up, then, is, what is a reasonable doubt?

The words almost define themselves: that there is a doubt founded in reason and arising out of the evidence in the case, or the lack of evidence. It means a doubt which a reasonable person has after carefully weighing all the evidence.

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A reasonable doubt is a doubt which appeals to your reason, your common sense, your experience, and your judgment. It is not caprice, whim, or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. If after a fair and impartial consideration of all the evidence, you can candidly and honestly, say that you are not satisfied of the guilt of the defendants ...that you do not have an abiding conviction of the defendant's guilt which amounts to a moral certainty..in sum, that you have such a doubt as would cause you to hesitate before acting in matters of importance to yourself, then you have a reasonable doubt, and in that circumstance it would be your duty to acquit.

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On the other hand, if, after such a fair and impartial consideration of all the evidence, you can, candidly and honestly say that you do have an abiding conviction of the defendant's guilt which amounts to a moral certainty, -- such a conviction as you would be willing to act upon in important matters pertaining to the affairs of your own life. then you have no reasonable doubt, and in that circumstance it would be your duty to convict.

One final word on this subject: A reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule few men, however

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guilty they might be, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which, by its nature, does not lend itself to proof by mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

With the aforegoing general instructions, let us turn to the charges against the defendant.

The four counts in the indictment are based upon the Internal Revenue Laws, in particular a section referred to as Section 7201 of Title 26. Those are the Internal Revenue laws which, in pertinent part, provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof is guilty of a crime."

An attempt to evade income tax for any one year is a separate offense from an attempt to evade the tax for any other year.

In substance, the indictment charges that the defendant, by preparing and causing to be prepared, and filing and causing to be filed, false and fraudulent joint tax returns willfully attempted to evade or defeat a large

part of the individual income taxes owed by him and his wife to the federal government for the calendar years 1967, 1968, 1969, and 1970.

The first count of the indictment reads:

The Grand Jury charges on or about February 19, 1968, in the Southern District of New York -- and the Borough of Manhattan, where the defendant lives -- Gilbert Fisher, also known as Gilbert Fisher, Jr., the defendant, then a resident of New York, New York, and elsewhere, who, during the calendar year 1967 was married, did unlawfully, willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1967 by preparing, and causing to be prepared, and filing, and causing to be filed, with the Internal Revenue Service a false and fraudulent joint income tax return on behalf of himself and his wife wherein it was stated that their joint taxable income for the calendar year 1967 was $731.14, and that the amount of tax due and owing thereon was $102.36, whereas, as he then and there well knew, their joint taxable income for the calendar year 1967 was approximately $87,522, upon which taxable income there was owing to the United States of America an income tax of approximately $37,703.

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The second and third and fourth counts are substantially the same, except for the dates, the amounts of the alleged taxable income and the claimed tax.

A copy of the indictment will be given to you so that you will have the specific details of the charges for each year.

Basically, the government contends that the joint returns substantially understated taxable income, and that the defendant thereby evaded taxes which were due and owing to the United States.

The government's position is that the defendant understated his income by failing to report, or failing to cause to be reported, on the joint tax returns in each of the years in question moneys received principally from his gambling activities and thereby attempted to evade the taxes that were due.

What must the government establish to sustain its charge as to each particular count?

It must establish the following essential elements:

1. That the defendant received substantial taxable income in addition to that reported from in return for the year in question, upon which unreported income additional federal income tax was due and owing;

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2. That the defendant made an attempt to evade or defeat the tax;

3. That he did so willfully.

With respect to the first element, the receipt of substantially unreported taxable income... this may be proved by any practical method available in the circumstances of a given situation. This may include circumstantial or direct evidence, or a combination of both. Accordingly, before we consider in detail the first and other elements of the offense, a word about the nature of evidence.

The law recognizes two types of evidence, direct and circumstantial.

Direct evidence is where a person testifies to what he saw or heard, that which he has knowledge of by virtue of his senses, that is, observation, touch, smell, or otherwise.

Circumstantial evidence is where proof is given of facts and circumstances from which in terms of common experience one may reasonably infer the ultimate tax sought to be established. Such evidence, if believed, is of no less value than direct evidence for in either case, the essential elements of the crime charged must be established beyond a reasonable doubt.

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Sometimes to convey to a jury a clear idea of what is meant by circumstantial evidence, I refer to an example. Perhaps this will convey to you more strikingly what is meant by circumstantial evidence.

It was, as we entered the building today, a clear day. At one point this morning the sun was shining. Let us assume that the sun was shining when you entered the building. You came into this courtroom and those venetian blinds behind you were drawn. In addition, assume there were drapes over the blinds. Now you cannot look out.

Assume that within a minute or so after you sat in the jury box I asked you the state of the weather. Well, realistically, you could not tell me by direct evidence because you could not look out.

Assume as we are sitting here, as we sat here this morning, say in maybe 40 or 50 minutes, someone entered through the door with an umbrella which appeared to be dripping wet, followed in a short time by a man wearing a raincoat that was wet; then you heard a pitter-patter against the window. There are three separate facts there. If I asked you if it was raining or what the state of the weather was, even bearing this in mind that when you entered it was a sunny day, you would agree that even though you could not look out and by direct observation tell me the

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state of the weather, nonetheless, you would be justified in drawing the inference from those three circumstances that, in fact, it was raining outside. That's all circumstantial evidence amounts to: your reason from established fact to an inference that is justified in terms of experience.

The government in this case, in the main, relies upon circumstantial evidence to sustain its burden of proof.

#3 To establish the first element, that the taxpayer had substantial additional taxable income which the defendant failed to report on the respective tax returns ... the government relies upon what has been referred to as the cash expenditure method which was described by the government's tax expert, John Spadola, who prepared the aid memoire charts for each of the years in question. This expenditure technique assumes that the expenditures in question were made by the taxpayer, or on his behalf, by someone using the taxpayer's money. The underlying concept of this method is that if the taxpayer is engaged in an income-producing activity and the taxpayer regularly makes expenditures, such expenditures, after eliminating therefrom any amounts which are attributable to money earned in earlier years, or to a non-taxable source, such as loans,

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gifts, or inheritances, constitute evidence of taxable gross receipts under properly determined conditions.

In other words, under this theory, if expenditures, however made in a given year, are substantially over and above reported income, and all non-taxable items, an inference is permitted, absent a satisfactory explanation, that the unaccounted difference or balance is unreported taxable income for the year in question.

In brief, if a man is engaged in an income-producing activity and is regularly making expenditures for his own purposes, this is proof that he has income, and if the amount of the expenditures exceed exemptions and allowabe deductions, the income is taxable.

However, proof of an excess of expenditures over and above exemptions and non-taxable items, by itself, is not sufficient to establish it constitutes taxable income during the period in question.

Under the theory more is required.

The government must establish that the claimed excess of expenditures were made from funds realized income through income-producing activity; and to be considered evidence of taxable income, the expenditures must be attributable to some current rather than a past source of income.

The force of the government's case when it relies upon approximations and inferences to be drawn from evidence submitted under the specific cash expenditure theory depends upon its, that is, the government, effective negating of reasonable explanations by the taxpaper as to non-taxable sources for the expenditures for the years in question.

Thus, explanations or relevant leads may be offered to the government by the taxpaper or his attorney, or other agent, as to the source of his funds used for deposits and cash expenditures in the years in question, such as cash on hand from prior years, or the receipts of gifts, loans, inheritances, transfers between accounts or other non-taxable items. If these are reasonably susceptible of being checked, the government must investigate into the truth of the explanation. Adequate investigation must be made by the government agents in order to negate the likelihood that such unexplained expenditures came from a non-taxable source.

On the other hand, when relevant leads are not forthcoming, the government is not required to negate every conceivable source of non-taxable funds.

The government's case in relying upon the expenditure theory is premised upon its claim that the

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defendant was engaged in lucrative gambling activities; in short, that the unreported income in the years in question came from his numbers or gambling activities.

The government claims that it has taken into account all factors and that the resulting sum of defendant's expenditures, plus or minus any increase or decrease in the amount of cash in bank accounts after subtracting non-taxable income of transfers, allowable business expenses, personal deductions and exemptions, produces a figure which fairly proximates the true taxable income of the defendant for each year in question.

If the government's theory is accepted, the net increase in taxable income as well as the computation of claimed additional taxes in each year for the individual returns is set forth in the testimony of John Spadola, the technical tax expert of the Internal Revenue Service, who also summarized his testimony on charts in evidence as Government Exhibits 145 through 149.

I have already instructed you that those unrelated exhibits were received only as aid memoirs. They are not evidence, your fact determination must be based solely upon the underlying exhibits in the case, the testimony of witnesses, and the totality of all the evidence.

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To the extent that the schedules conform to what you determine the underlying evidence to be, you should accept it; to the extent that the schedules differ from what you determine the underlying evidence to be, you should reject it.

(Continued on next page.)

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The fact determination as to the issue, I emphasized this to you yesterday, is for you and you alone.

The defendant challenges the accuracy of the analysis made by the Government to sustain its claim under the cash expenditure theory.

The defendant does not deny that he engaged in gambling in numbers activities.

Incidentally, as I instructed you during the trial, I believe this came up yesterday, you are not to be concerned with the fact that by engaging in such activities the defendant may have violated either federal or state laws. Any such alleged illegality is not to enter into your deliberations. It is not a matter for your consideration.

However, income, even if derived from illegal activities or any gambling activity, constitutes taxable income and must be reported.

The significance of deferdant's gambling activities in this case is whether or not this was a substantial source of income in the years in question which he omitted to report.

In addition to the presumption of innocence in his favor, the defendant in large measure relies upon his gambling activities to resist the Government's charges.

He argues that by reason of such activities, he had

substantial cash on hand before the years 1967 through 1970, the tax years in question, and that those funds, plus income reported on the joint returns, were the source of the expenditures in those years.

The defendant points to his testimony in the Nevada divorce proceedings that he gave Rosalie Fisher $193,000 in 1966.

He also contends that another source of funds was his father, who a witness testified also was in the gambling business, and had sums of money available.

Further defendant claims that as to the property in Englewood, the moneys expended in 1967 for the purchase of the lot, the construction of the home, the installation of the swimming pool, the landscaping and the furnishings were paid by his parents.

As to the defendant's claim that he had large sums of money on hand prior to the tax years in question, the Government points to the general and vague nature of the defense testimony on this subject.

Also it contends that the defendant's very testimony in the Nevada proceedings negates his claim and that, in fact, it showed that large sums were earned in the tax years in question.

In addition, the Government points to the testimony

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of Rosalie Fisher who specifically denied that she received $193,000 from defendant in 1966 contrary to defendant's testimony in the divorce proceedings in Nevada.

The Government also relies upon the testimony of Spadola, who was one of the investigating unit,, that they found no documented source of income of the defendant or evidence of cash on hand prior to 1967.

That, apart from the defendant's own statement, he saw no evidence of any such money.

As to the Englewood property, the Government con - tends that the defendant was the true buyer and owner and that his funds, not his parents', were used to purchase the lot and build the house with its improvement and furnishings.

Here the Government relies upon testimony that it was the defendant who was active in and negotiated the trans- actions and that it was he who made the payments, mostly in cash, in bills of small denominations.

In sum, the Government contends that the defendant used his parents' name on the deed to the property and in the con'racts to conceal that he, in fact, was the owner and that he was the source of the funds.

Further, the Government, to negate the defendant's claim, argues that the proof establishes that the father had

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been an elevator operator, who was then retired, that is, in 1967, and except for his Social Security income and some interest from a small savings bank account, had no other source of income.

It stresses also that the defendant's parents applied for Medicaid assistance.

Thus, upon all the evidence, you will decide whether the Government has sustained its burden of proof as to the first element under the expenditure theory; that the defendant had substantial unreported income upon which substantial taxes were due.

Incidentally, the Government does not have to establish the exact amount of the unreported income or the additional tax claimed to be due as specified in the indictment to a mathematical certainty, but you must be satisfied that these were substantial.

There are no exact guidelines of mathematical certainty as to what is a substantial amount of tax owed. This varies in each individual case. This is a matter for your determination and may be measured by the ratio which the unreported tax bears to the reported tax.

The second element is that there must be an attempt to evade or defeat the tax. The attempt may consist of the failure to report the full income required

by law.

Here under the indictment, the defendant is charged with the attempt to evade a large part of his tax by "preparing and causing to be prepared and filing and causing to be filed false and fraudulent joint tax returns with respect to counts 1 through 4 by failing to include in each instance his full taxable income.

An attempt is made when a false return is knowingly filed. There is no dispute that the defendant did not personally sign the joint tax returns, but that they were signed by his then wife, Rosalie Fisher.

Also, it appears there is no dispute that the returns were prepared by John Singleton.

It is of no consequence that defendant did not personally sign any of the joint returns so long as the evidence establishes that he caused the false returns to be filed such as by giving another person permission to sign returns for him.

Also, there is no requirement that the defendant execute a power of attorney for his wife to sign the returns. It is sufficient if you find, whether by direct or circumstantial evidence or both, that the defendant authorized the returns to be made and filed knowing that they were false.

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The Government here relies on the testimony of the defendant's former wife, Rosalie Fisher, that he authorized her to sign his name; that she signed his name on the tax returns for the four years in question after discussing this with the defendant, and, further, that the Fishers frequently signed each other's name.

In addition, Rosalie Fisher testified that prior to sending in the retruns, she discussed with the defendant the various items included in the returns for the four years in question and, further, that the defendant examined the returns for the years 1967, 1968 and 1969.

The accountant, John Singleton, testified that when he went to the Fisher's apartment for the preparation of the returns for the years 1967, 1968 and 1969, both the defendant and Rosalie Fisher were present, that he discussed with them the items to be included in the return, and that the Fishers said that they frequently signed each other's name.

As to the contents of the return, the Government points to the testimony of Singleton that he asked the defendant and his then wife for all required information as to income from any source in order to file correct returns and that he prepared the 1967, 1968 and 1969 returns on the basis of such information.

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Singleton further testified that neither the defendant nor Rosalie Fisher advised him, nor did he know, of any gambling income.

To sustain the charge that the defendant caused to be filed a false and fraudulent tax return, you must be satisfied that the defendant knew he had taxable income in the years in question which he was required by law to report, and that he attempted to evade or defeat the tax on that amount, or a substantial part of it, by knowingly and purposely failing to advise those preparing the returns of all of the income which he knew he had during the calendar year, and which he knew it was his duty to state and report in his return for the years in question.

If, upon all the evidence, you find beyond a reasonable doubt that the defendant knowingly was a party to an arrangement of not reporting known income, then it is immaterial that he himself did not sign the return.

If the defendant provided full information, or caused such full information to be transmitted, to John Singleton as to his income during a tax year and the return was filed as prepared by Singleton without the defendant having reason to believe that it was not correct, then you

find the deendant not guilty.

If, on the other hand, you find beyond a reasonable doubt that the defendant did not provide or caused to be transmitted to John Singleton full and complete information as to his income in a tax year, and further, that the defendant knew that the returns prepared by Singleton were not correct and had substantially understated the tax liability of the defendant, the fact that he did not prepare the return himself, but rather had it prepared for him by another, is immaterial.

There remains the third element: Whether the defendant's failure to report or caused to be reported additional taxable income, that is, the attempt to evade or defeat the payment of taxes, if you do so find, was wilful.

Even if you should find the defendant's income was understated in the returns, but that he he did not do so wilfully with an intent to evade taxes, you must acquit him.

The Government must establish beyond a reasonable doubt that the defendant acted with the specific intent of concealing the true taxes known by him to be due.

Wilful means that one does an act purposely and with the specific intent to disregard the law or to do

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that which the law forbids. It involves conscious wrongdoing or as it has sometimes been stated, an evil state of mind... a criminal intent and purpose to violate the law in this case, to cheat the Government out of any part of taxes known by the defendant to be due.

On the other hand, wilfully does not mean inadvertence, carelessness or honest misunderstanding of what the law requires. There is no wilfulness in errors of law, mistakes in fact or bad judgment.

Wilfulness, the state of a man's mind, I have often said to jurors, is an issue of fact as much as the state of a man's digestion.

In the context of this case, wilfulness may be defined as the state of mind of a person who is fully aware of the existence of a tax obligation which he deliberately attempts to evade.

It is an issue you are called upon to decide.

Medical science has not yet devised an instrument by which we can record what was in one's mind in the past or what then motivated him.

The state of a man's mind may be inferred from his words, his action and his conduct. Thus, direct proof of wilfulness is not required.

It would be a rare case where it could be shown

that a taxpayer stated he was doing certain things with the specific object of defeating or evading the payment of his income tax.

Accordingly, circumstantial evidence is usually relied upon.

I have already told you that circumstantial evidence under our law is as weighty as direct evidence. Consideration of all the facts and circumstances established by the evidence, together with the exhibits, may permit a reasonable inference of wilfulness.

The Government contends that the evidence in this case points to the conclusion that the defendant acted wilfully, with the intention of evading and defeating personal income taxes, and not carelessly or inadvertently.

Wilful intent may be inferred from (1) covering up sources of income or covering up specific expenditures; (2) the receipt of taxable income without disclosing this to one who prepares the taxpayer's return; (3) the use of cash in the major portions of one's transactions; (4) a practice of placing property or other assets owned by one in the names of various relatives as nominees; (5) taking contracts in the names of relatives to cover up who the real party in interest is; (6) avoiding making records usual in transactions of the kind, or (7) by any conduct,

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the likely effect of which would be to mislead or conceal the true facts as to one's income.

If the tax evasion motive plays any part in such conduct, wilfulness may be found even though such conduct may also serve some other purpose.

While an individual is not liable for negligence or carelessness in filing an incorrect return, yet if you find the returns were incorrect in that they failed to include substantial taxable income, and further find the defendant was aware that the returns were incorrect because he failed to report or caused to be reported such additional substantial income, these are circumstances which you may consider in determining whether the defendant had wilful intent to evade payment of taxes by filing false returns.

A taxpayer may delegate the responsbility for the preparation of his returns to a person whom he has reason to believe is competent to handle such matters.

The mistakes or conduct of such a person are not attributable to the taxpayer.

However, the taxpayer is required to give or make available accurate information with respect to his income to the person he engaged to prepare the return.

The taxpayer cannot blame or shift the responsibili

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to the person he retains if he deliberately withholds from that person such vital information.

On the other hand, as I have already told you, if in fact the defendant furnished such full information to those preparing the joint returns, and this was not included in the returns of which he was unaware, then he cannot be held liable.

One final word on evidence which I believe I referred to in discussing the difference between direct and circumstantial evidence.

If the evidence upon the whole case reasonably points to two conclusions; one favoring guilt, and the other favoring innocence, then you must accept the conclusion of innocence, since in that circumstance, there would be a reasonable doubt.

To sum it up, in considering each count separately, you must find beyond a reasonable doubt before you can convict the defendant, (1) that there was a substantial amount of federal income tax due and owing from the taxpayer; (2) that the defendant attempted to evade that tax, and (3) that the defendant acted wilfully.

If you do not find all these three elements beyond a reasonable doubt as to the defendant on a particular count, then you must acquit him on that count.

On the other hand, if you find all the elements beyond a reasonable doubt as to a particular count, then you should return a verdict of guilty on that particular count.

I have refrained from any attempt to array all the evidence in this case, particularly because it has been evident to me, as I mentioned at the start, and counsel also noticed, that you followed the testimony of the trial with keen, absorbing interest.

In addition, counsel in their extensive summations, have very thoroughly reviewed the evidence and advanced before you their contentions with respect thereto.

The fact that I have not attempted to review the testimony of each of the witnesses and my failure to comment upon any other part of the evidence is no indication that these have been disregarded or that I am placing special emphasis upon such testimony as I have called to your attention in this charge.

You must, of course, consider all the testimony and exhibits in the case. All are important.

In the reference that I made to evidence, and I believe I referred to this at the start of the charge, I have, of course, attempted to adhere to the trial record, but if perchance any statement I made does not

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accord with your own recollection of the testimony, you will disregard my statements and depend entirely upon your own recollection of the evidence which, as I have said several times, governs always.

Obviously, in determining the various questions you are called upon to decide,you will have to pass upon the credibility of witnesses.

How do you determine where the truth lies?

I mentioned at the very start of the trial before you heard a single word of testimony, that it was important for you not only to listen, but to look at and observe the witnesses as they testified.

Your determination of the credibility of a witness very largely depends upon the impression that he made upon you as to whether or not he or she was giving an accurate version of what occurred.

I often say to jurors when you walk into the courtroom and sit in the jury box, while the trial is going on or while you are deliberating in the jury room, you will have your common sense, your good judgment, and your experience with you.

The degree of credit to be given a witness should be determined by his demanor, his or her relationship to the controversy of the parties, his or her bias

or impartiality, the reasonableness of his or her statements, the strength of weakness of recollection viewed in the light of all other testimony and the attendant circumstances in the case.

How did the witness impress you? Did his or her version appear straightforward and candid? Or did he or she try to hide some of the facts?

Is there a motive to testify falsely?

In other words, what you try to do, to use the vernacular, is to size a person up just as you would in any important matter when you are undertaking to determine whether or not a person is truthful, candid and straightforward.

In passing upon the credibility of a witness, you may also take into account inconsistencies or contradictions as to material matters in his or her own testimony or any admissions of false testimony or false statements on prior occasions.

However, the ultimate question for you to decide in passing upon credibility is: Did the witness from that witness stand tell the truth before you in this courtroom?

It is for you to say whether his or her testimony at this trial is truthful in whole or in part in the

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light of his or her demanor, the explanations, and all the evidence in the case.

The fact that a witness is a Government employee does not require that his testimony be given greater weight or consideration than that accorded any other witness.

In appraising the credibility of all witnesses, Government and defense, you take into account the interest of the witness, motive, and other factors that may reasonably be considered to influence or color one's testimony.

For example, in considering the testimony of Rosalie Fisher, you may ask yourselves whether her testimony at this trial was motivated by or inspired by ill will or hostility toward the defendant or because she was not named together with her former husband as a defendant in this case, or did she, sworn before you to tell the truth, testify in accordance with her oath.

You may take into account any interest you may find that the aunt of the defendant had or has in the defendant's welfare or interests.

As I have said, the ultimate question in all cases with respect to any witness is did the witness tell the substantial truth before you.

If you find that any witness, and this applies to all witnesses, Government and defense alike, wilfully

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testified falsely as to any material fact, you have a right to reject the testimony of that witness in totality or to accept only that part or portion which commends itself to your belief or which you may find corroborated by other evidence in the case.

The defendant has not testified. That is his absolute right and in no respect may such failure to testify be considered by you as any evidence against him or as a basis for any presumption or inference unfavorable to him.

The Government, to prevail, must prove the essential elements by the required degree of proof as already explained in these instructions.

If it succeeds, your verdict should be guilty.

If it fails, it should be not guilty.

Each count must be considered separately and a separate verdict rendered as to each. Thus, your verdict may be not guilty on all counts or guilty on all counts or guilty or not guilty on one or more counts as the case may be.

To report a verdict, it must be unanimous. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely on the basis of such evidence and these instructions.

Under your oath as jurors, in the event the evidence warrants a verdict of guilty, you cannot allow the consideration of the punishment that may be imposed upon the defendant, if he is convicted, to enter into your deliberations or influence your verdict in any way.

Your sole duty is to decide whether or not the Government has sustained its burden of proof as to these charges.

In the event of a conviction, the duty of imposing sentence rests solely with the Court.

Each juror is entitled to his or her own opinion. Each should, however, exchange views with fellow jurors. That is the very purpose of jury deliberation to discuss and consider the evidence; to listen to the arguments of fellow jurors, to present your individual views; to consult with one another; and to reach an agreement based solely and only on the evidence, if you can do so without violence to your own individual judgment.

If you should have a point of view that differs from that of fellow jurors and if after discussion, you are persuaded, based upon the evidence in the case, that the originally held point of view should yield in the light of the testimony, then there is no reason why you should not change that originally held point of view

provided always your final vote represents your own conscientious judgment as to how the case should be decided upon the law and the evidence.

The charge here made is serious. The just determination of this case is important to the public. Equally it is important to the defendant.

Under your oath as jurors you must decide this case without fear or favor and solely, as I have stated a number of times, in accordance with the evidence and the law.

If the Government has failed to carry its burden, your sworn duty is to acquit.

If it has carried its burden, you must not flinch from your sworn duty; you must convict.

Now, members of the jury, you might stay where you are and I will see counsel in the robing room.

(In the robing room.)

THE COURT: Mr. Naftalis, you may state your exceptions.

MR. NAFTALIS: Yes, your Honor.

First, in connection with your summarization of the evidence, you pointed out that Mr. Spadola had testified that he had looked and found no cash available before 1967 from which the expenditures could have been made.

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I would request your Honor to supplement your charge by pointing out that Mr. Spadola further testified that although he was aware of this Nevada transcript and so on, he never made any attempt during any of their investigations of Rosalie Fisher, to ever look at her safe deposit box or seek permission to look at her safe deposit box.

THE COURT: You argued that to the jury. I see no need of adding that.

What is your next point?

MR. NAFTALIS: Your Honor, I except to the instruction of your Honor on wilfulness when your Honor pointed out in words to the effect, and I am not sure exctly, athe jury could draw an inference from the use of cash in connection with business transactions.

I would except to that, your Honor, on the ground that unless there was some other element of concealment connected with the cash, in and of itself I wouldn't think that should be a ground for wilfulness.

My final point, your Honor, in connection -- during your extensive instructions on the expenditures theory, I do recollect some language that the jury was entitled, assuming that the expenditures, according to the Government, exceeded the income, the jury was entitled to draw an

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inference that this was income unless satisfactorily explained.

My exception there is "the unless satisfactorily explained" seems to shift the burden of proof.

THE COURT: I did not say the defendant had to explain it.

MR.NAFTALIS: I know you did not, but it seems to me the language "unless satisfactorily explained" leaves only one person to do the explaining.

I have made my record.

THE COURT: Well, if you want me to, I will change that to "unless other evidence in the case satisfactorily explains it."

If you want me to amend it, I will do it that way.

MR.NAFTALIS: Let me talk to Mr. Wallace on that for a moment.

(Pause.)

MR. NAFTALIS: Your Honor, no, I don't want a further charge in that area.

THE COURT: I was going to say, I am prepared to go back and instruct the jury that"unless satisfactorily explained by evidence in the case."

All right.

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(In open court.)

THE COURT: Members of the jury, before we go; we have two alternates -- we don't need this on the record.

(Discussion off the record.)

(Alternates leave the courtroom.)

THE CLERK: Will the marshals step forward, please.

(Marshals sworn.)

THE COURT: I said I was going to give you a copy of the indictment.

Give this to the foreman.

Did you show it to Mr. Naftalis?

MR.NAFTALIS: I am sure it is fine. I will look at it very quickly.

THE COURT: All right. You go with the marshals then.

(The jury retuired to deliberate at 3:20 p.m.)

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(4:05 p.m.)

THE COURT: I have a request from the jury, "Nevada divorce payments."

What exhibit is that? 68A.

I just showed Mr. Naftalis the papers and this is the one paragraph that he didn't want any reference to, the FBI. That I redacted. He asked it be retyped. We sent that little paragraph to be retyped and then we will send it right in.

xx (Court Exhibit 1 marked.)

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(At 4:20 p.m.,a note was received from the jury.)

(In the robing room.)

THE COURT: I have a note reading: "Testimony relating to bank books by Mr. Butterfield and Mrs. Rosalie Fisher."

Off the record.

(Discussion off the record.)

...

(At 4:30 p.m., a verdict was announced.)

(In open court.) (Jury present.)

THE COURT: I received one note from you and then I received another note that you had reached a verdict.

Is that correct?

THE FOREMAN: That is correct.

THE COURT: You didn't want the testimony.

THE CLERK: The jurors will please answer as their names are called.

(Roll called. All jurors present.)

THE CLERK: Mr. Foreman, have you agreed upon a verdict?

THE FOREMAN: Yes, sir.

THE CLERK: How do you find, sir?

THE FOREMAN: Guilty.

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THE CLERK: You find the defendant guilty on all four counts?

THE FOREMAN: On all four counts, yes, sir.

THE CLERK: Thank you, Mr. Foreman. You may be seated.

Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

You say you find the defendant guilty on all four counts, and so say you all.

MR. NAFTALIS: Your Honor, may the jury be polled?

THE COURT: The jury may be polled.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

You say you find the defendant guilty on all four counts, and so say you all.

(Each juror, upon being asked by the Clerk, "Is that your verdict?", answered in the affirmative.)

THE CLERK: Jury polled, your Honor. Verdict unanimous.

THE COURT: Members of the jury, you have had a full day here, but before you go, I am going to detain you just for a little while.

First, I don't remember how many jurors are

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serving for the first time. How many have served on juries before?

(Three responded.)

THE COURT: The reason I am going to detain you is this. This is what I generally tell the jurors, and what I am about to tell you is emphasized by a statement made by defense counsel in summations.

A practice has grown up through the years of thanking juries for their service and also for the verdicts which they return.

I would say I have rigidly followed a contrary practice of never thanking a jury for a verdict. I did not want to interrupt counsel in the course of his summation when he thanked you for your service here. But I have often felt that jurors who serve, as I termed it in the charge to you, as ministers of justice and play an important role in the administration of justice, and do so under an oath of office, must not expect to be thanked for the service they render.

You were called upon to perform a very important task in the administration of justice and in doing that, you took an oath somewhat akin to that which a judge takes when he takes office for the first time, and this is an oath under which basically you are not to respect persons

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in judgment; but to render a conscientious judgment on the law and the evidence.

My view has always been,when those of us who are called upon to discharge this heavy responsibility to render a judgment, we are doing so conscientiously because we believe that the facts in the case warrant it and because we perform that service.

I have never believed that we are entitled to be thanked for it.

In short, we call the shots as we see them and that's it.

I have never permitted any litigant in a case ever to thank me for any judgment I have rendered and for the same reason I don't thank you, and I hope you will understand that.

I did not want you to go out of the courtroom wondering why some judges sometimes thank the jury. I have always felt that the thanks that one may expect is simply that we should be thankful that we live in a society under a system of justice when these problems come up between the Government and persons accused of crime, it is the citizens that are called upon to play the important role of ministers of justice.

I think serving on a jury is one of the highest

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privileges of citizenship, and I say the thanks do come that we do live in a society that when these problems of society do come up, that you are called upon to render a service, and those are the only thanks.

Thank yourselves that you live under that kind of a society.

One other item. I think some jurors at times are curious to know what the judge thinks about their verdict, whether he agrees with it or not, and again, I never comment on a jury's verdict.

I told you that it was your responsibility. You were the judges of the facts. It is your decision.

My only concern, and the only concern I ever have with a jury, is that a jury render a conscientious verdict based on the evidence and the law as they have been instructed.

I have no doubt that you have done that in this case, but, as I say, I never comment on a jury verdict. I am satisfied, as I am sure the lawyers are satisfied, that you were a very attentive jury. I think all of us watched you and it was evident that you followed everything in the case, as I said, with absorbing interest.

To those of you who have gone through your first experience as jurors, I hope, (1) that you do understand the

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importance of jury service. As I say, it is one of the highest privileges of citizenship, and should you be called again, I hope that your experience here has been such, whether you are called in this court or any state court, that you will look forward eagerly to playing an important role in the administration of justice.

I will say it was a great pleasure to work with you and to say I do hope that if you are ever called again, that you will look forward to playing this important part in community life and in the administration of justice.

I will say good night to you and I hope you all have a pleasant week-end.

THE CLERK: The jurors are discharged.

THE COURT: You have your certificates. You are discharged for the term.

Should you be called before another Court, you have the privilege of not serving for two years, and you have evidence that you have served.

I will say good night to you.

(Jury left the courtroom.)

THE COURT: The Court will require a pre-sentence report in this case and fixes December 6th for sentence.

Mr. Naftalis, will you see that your client gets

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to the Probation Office.

What is the status of the defendant as far as bail is concerned?

MR. NAFTALIS: I think Mr. Feinberg has told me he is on a $10,000 personal recognizance bond.

Mr. Feinberg told me he has no objection to continuing that bail status.

THE COURT: All right. Bail is continued to date of sentence.

MR. NAFTALIS: Your Honor, with regard to any motions, might the time for the defendant to make any motions be extended to the day of sentence?

THE COURT: No, I think you ought to make them returnable before then. I think you should make your motion within ten days.

MR. NAFTALIS: Within ten days.

THE COURT: Yes.

All right. Good night, gentlemen.

...

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	NO. 74 Cr. 388
v.	NOTICE OF MOTION
GILBERT FISHER,	
Defendant.	

TO: MR. KENNETH FEINBERG, ESQ.
Asst. United States Attorney
United States Courthouse
Foley Square
New York, New York 10007

PLEASE TAKE NOTICE, that the undersigned will bring on the annexed motions for hearing and disposition before the Hon. Edward Weinfeld, Judge of the United States District Court at Room 905, United States Court House, Foley Square, County of New York, City of New York, on the 26th day of November, 1974 at ~~10:00~~ 2:15 o'clock in the ~~fore~~after noon of that day or as soon thereafter as counsel can be heard.

FRED L. WALLACE
Attorney for Defendant
200 West 135th Street, Rm 218
New York, New York 10030

(212) 283-0600

695

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	NO. 74 Cr. 388
v.	MOTIONS TO ACQUIT; FOR NEW TRIAL; AND TO DISMISS THE INDICTMENT
GILBERT FISHER, Defendant.	

Comes the Defendant, and by his attorney, moves the Court as follows:

A) Pursuant to Rule 29 of the Federal Rules of Criminal Procedure, to set aside the verdict of guilty returned in the above-entitled case on November 8, 1974, and to enter judgment in accordance with the motion for judgment of acquittal made by the Defendant at the close of all of the evidence presented by the United States in the above-entitled case.

B) Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, to grant Defendant a new trial for the following reasons:

1. The Court erred in denying Defendant's motion to acquit at the conclusion of the Government's case.

2. The Court erred in denying Defendant's several motions for modest extensions of time in order for Defendant to better and more adequately prepare his defense to the complicated case posed against him by the Government.

3. The Court erred in depriving Defendant of the right to be represented by the attorney of his first choice.

4. The Court erred in failing and refusing to consign the case of Defendant for reassignment to another trial judge and in denying Defendant's motion that the Court so effect such a reassignment.

5. The Court erred in permitting Defendant's wife, Rosalie Fisher, to testify against him over Defendant's objections and claims of privilege.

6. The Court erred in binding and holding Defendant to waivers, stipulations, and other agreements made or accomplished by Defendant's former attorney, at a former trial, and without Defendant's knowledge or intelligent consent.

7. The Court erred in permitting the confidential testimony of Defendant given in a divorce proceeding to be introduced by the Government against Defendant while Defendant was asserting his right and privilege not to take the stand.

8. There was no evidence upon which a reasonable jury could find beyond a reasonable doubt or to a moral certainty that Defendant was guilty of the crimes charged or the specific acts and intentions alleged in the indictments.

9. The Court erred in permitting any evidence relating to the trust properties in New Jersey or expenses pertaining thereto to go to the jury as a factual matter subject to their interpretation without the Government's having introduced any prerequisite evidence sufficient to attack or overcome the presumption of the legitimacy of the trust, its regularity, and the rights of numerous parties other than Defendant inextricably related to that trust and its legitimacy.

10. False, misleading, and perjured testimony was used to establish key and essential elements of the crimes charged against Defendant.

11. The verdict was contrary to the weight of the evidence.

12. The verdict was not supported by substantial evidence.

13. The Court erred in overruling objections of Defendant to questions addressed to Rosalie Fisher which elicited testimony concerning confidential communications between Rosalie Fisher and Defendant

C) To set aside and dismiss the indictments in this case and the verdict resting thereon because:

1. Perjured testimony was used to obtain the indictment of Defendant.

2. Hearsay testimony was used substantially to obtain the indictment of Defendant.

3. Venue for the case is improperly laid in the Southern District of New York and should be laid in the United States District Court for New Jersey.

Dated: New York, New York
November 15, 1974

Respectfully submitted,

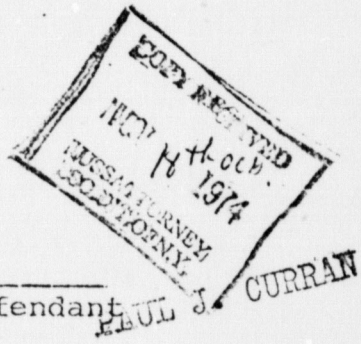
FRED L. WALLACE
Attorney for Defendant

200 West 135th St., Rm 218
New York, N.Y. 10030
(212) 283-0600

CERTIFICATE OF SERVICE

This is to certify that on this 18th day of November, 1974, I served one copy of the within MOTIONS TO ACQUIT; FOR NEW TRIAL; AND TO DISMISS THE INDICTMENT and NOTICE OF MOTION in relation thereto upon the following person by hand delivering a true copy of same to him or his clerk.

Kenneth Feinberg, Esq.
Asst. United States Attorney
United States Courthouse
Foley Square
New York, New York 10007



PAUL J. CURRAN

Attorney for Defendant

KRF:sk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- :

GILBERT FISHER a/k/a Gilbert Fisher, Jr., :

Defendant. :

----------x

AFFIDAVIT IN OPPOSITION

74 Cr. 388 (EW)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

KENNETH R. FEINBERG, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and am fully familiar with the facts of the above-captioned case. I make this affidavit in response to Motions to Acquit, For New Trial and To Dismiss the Indictment, made by the defendant Gilbert Fisher and served on the Government on November 15, 1974.

2. Indictment 74 Cr. 388, filed on April 11, 1974, charged the defendant Fisher with four counts of income tax evasion, in violation of Title 26, United States Code, Section 7201. On November 8, 1974, the defendant was convicted, after a jury trial before the Honorable Edward Weinfeld, on all counts of Indictment 74 Cr. 388 and sentencing was set by the Court for December 6, 1974. The instant motions were made by the defendant Fisher following his conviction, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure.

KRF:sk

3. In his motion papers, the defendant Fisher asks the Court to set aside the verdict of guilty returned on November 8, and enter a judgment of acquittal. In addition, he lists thirteen instances of error committed during the trial, claiming that these entitle him to a new trial. Finally, he argues in his papers that the underlying indictment in this case should be dismissed for various reasons.

4. As to the defendant's claim that the Court should set aside the verdict of guilty and enter a judgment of acquittal, the simple answer is that the jury's verdict is most reasonable in light of the overwhelming evidence of guilt presented for its consideration. The testimony of Rosalie Fisher, John Singleton and, perhaps more importantly, Aaron Nussman and Eugene Mentes, coupled with the various documents received into evidence point unmistakably to the guilt of the defendant.

5. The various claims of error at trial asserted by the defendant in his motion papers are equally frivolous. Initially it should be pointed out that the defendant had a full and complete opportunity during the course of the trial to litigate the various matters now asserted. Indeed, on numerous occasions both prior to and during the trial all of the thirteen alleged errors were fully litigated by the defendant. For example, on no less than three separate occasions, both Mr. Wallace, Mr. Perido and Mr. Naftalis argued to the Court that further pretrial delay was necessary in this case. The Government opposed these applications,

citing the extensive delay which had already occurred, and the Court refused to grant the extension. Simply stated, these matters have been fully litigated adversely to the defendant.

6. In any event, the defendant makes categorical assertions of error totally unsubstantiated in law and by the specific facts of this case. Thus, the defendant claims that Rosalie Fisher should not have been allowed to testify in this case and that the marital privilege was breached as a result of her testimony. Not only was the defense objection to Rosalie Fisher's testimony untimely and unsubstantiated -- being made just prior to the selection of the jury on the basis of a hearsay statement by a lawyer in Nevada that a final decree of divorce had not been entered -- but this precise point had already been raised and rejected by the Court as a matter of law prior to the first trial. In addition, the defendant's testimony during the divorce proceeding was clearly admissible at trial as an admission against interest.

7. Nor may defense counsel realistically argue that the Court erred in binding him to previous waivers and stipulations entered into by his lawyer at the last trial. The issues in this case were relatively simple and turned on the credibility of the Government's witnesses and not on the various documents, the admissibility of which were voluntarily stipulated to at this trial as well as the last trial.

8. The defendant also errs in arguing that evidence concerning the defendant's scheme to evade taxes on expenditures made in New Jersey should have been held inadmissible. The very gist of the defendant's scheme was to spend his money through designated nominees in order to give his expenditures the appearance of propriety and to avoid being discovered as the source of the expenditures. Defense counsel would have this court continue to promote this scheme by refusing to admit into evidence testimony and exhibits showing the defendant to be the true source of the expenditures. The Court was obviously correct in rejecting defendant's claim.

9. Whether or not the Government used false, misleading and perjured testimony at trial was a determination to be made by the jury in passing on the credibility of the Government's witnesses. The Court's credibility charge to the jury was adequate in this regard.

10. The defendant's claim that the indictment should be dismissed is not only untimely - being made for the first time after trial - but is without merit as a matter of law.

WHEREFORE, for the reasons stated, the Government respectfully prays that the defendant's application be denied.

KENNETH R. FEINBERG
Assistant United States
Attorney

Sworn to before me
this 26th day of November, 1974.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

vs. : 74 Cr. 388

GILBERT FISHER, JR., :

Defendant. :

- x

November 26, 1974,
2:15 P.M.

Before:

Hon. Edward Weinfeld,
District Judge.

Appearances:

PAUL J. CURRAN, United States Attorney,
For the Government,
Kenneth Feinberg, Esq., Assistant U.S. Attorney.

FRED L. WALLACE, ESQ.,
For the Defendant.

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(Case called.)

THE COURT: Who is for the motion?

MR. WALLACE: If your Honor please, my client Mr. Fisher was convicted on four counts of income tax evasion and I have submitted to you and I submit to you now various motions to acquit and for a new trial and to dismiss the indictment.

I would appreciate it, your Honor, in order to save time serving in support of these motions and particularly motion number B5 a certified transcript from the Supreme Court of Nevada.

THE COURT: I am not going to take anything now that wasn't in the record before me at the time I decided the matter.

MR. WALLACE: If your Honor please, we talked about this matter in chambers and you indicated then that I should submit this later, it might not be necessary to submit it at the time I talked to you. That is the conversation I recall.

THE COURT: No, the morning that matter was presented was on the basis of a telegram and I said I certainly was not going to act on any hearsay information and that is all it was.

MR. WALLACE: It is like hearsay, that is all it

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was and I indicated to your Honor and the attorney that I think because it was my duty to offer to the court that I heard this and I asked then that the testimony of Fisher be further investigated. That was out of hand denied immediately on the basis of obviously hearsay and I never said it was anything other than that.

I immediately telephoned Nevada and asked them to send this certified transcript. It arrived and at the time the government rested, I believe on Thursday, I had it with me and I then brought it to you in chambers and submitted it to you and at that time your Honor said or I argued about it bearing perhaps on the circumstance of the bigamist relationship in New Jersey and perhaps I did not need it,perhaps it should not be submitted at that time. I told your Honor I would not submit it and you reserved decision until later. Obviously, with my man convicted that later point has arrived.

I think that I do have a right to submit evidence in support of these motions and on this motion now and to offer it to your Honor on the basis Rosalie Fishr does not have a final divorce from Gilbert Fisher and the proof of the relationship thereto is the certified transcript. I have no way of injecting it into the record other than submitting it to you.

THE COURT: Go on with the rest of your argument.

MR. WALLACE: I take it your Honor refuses to accept it?

THE COURT: It may be deemed part of the motion but I am stating it is not part of the trial record. I can't stop you from submitting anything you want in support of the motion. I want it clear that this is not part of the record. You may submit anything you want whether it is relevant or irrelevant.

MR. WALLACE: In that case I submit it as part of the motion.

THE COURT: Argue the motion.

MR. WALLACE: Your Honor, I would also like to submit again as part of the motion and in reference to item numbers B2, 3 and 4, certain letters that your Honor received.

THE COURT: All right, go ahead.

MR. WALLACE: In relation to motion B2, 3 and 4, I believe those four points having to do with the extension of time, the continuance that was requested of your Honor, I would like to submit a set of letters all of which your Honor has in possession either becausethey were sent to you or copies were sent to you. One is dated October 15, 1974, to Mr. Gilbert Rosenthal from me. One dated October 15, 19[illegible],

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

to your Honor from me and one under date of October 15, 1974, to Mr. Kenneth Feinberg the prosecutor from myself.

In addition to that, the letter and attachments under date of October 17, 1974, to Fred Wallace from Gilbert Rosenthal with an attachment indicating those things he was transmitting to me as of that date and, lastly, two letters, both from Mr. Gilbert Rosenthal, one to Gilbert Fisher of November 1st, 1974, and one under date of November 1st, 1974, from Mr. Rosenthal to Mr. Kenneth Feinberg, transmitting to him the 3500 material Mr. Feinberg refused me on my first entry into the case.

Your Honor, I submit these in reference to the point also in connection with your Honor's several notations as to the trial and the length of time that I was involved in this case. I think it was variously stated as being from four until, finally, six weeks. I think your Honor will note the actual days was 19 days. The motion for a first continuance was made within the first week.

Incidentally, I call to your Honor's attention this question of the granting of a continuance is within the sound discretion of your Honor without question. On the other hand, it would be a matter of whether or not an abuse of discretion was involved in this case in terms of the refusal to grant the defendant his request for a

reasonable adjournment and I made it very clear by the fact that your Honor in fact whether intentionally or not, denied defendant the right to ask for a continuance before the defendant had in fact asked for any continuance.

In terms of analyzing the question whether or not there was in fact an abuse of discretion, I believe that that matter of the timing of your original directive in this matter is determinative.

I will submit to your Honor these motions and the transcript, the exhibits that were entered during the trial and these additional matters that I brought to your attention today and thank you very much again.

MR. FEINBERG: This matter has all been litigated before, both prior to and during this trial and the matters were ruled on against the defendant and we rest on the record of this case.

THE COURT: The motion is denied.

MR. WALLACE: Is that in all parts?

THE COURT: In all respects.

MR. WALLACE: Thank you very much.

THE COURT: Was there any reference made at the trial at all to a venue question?

MR. FEINBERG: None, your Honor.

MR. WALLACE: No, but it can be raised at any

point. I believe the rules so state.

THE COURT: Are you sure of that?

MR. WALLACE: Yes, I am. If not, I obviously withdraw the point.

THE COURT: I don't ask you to withdraw anything. I simply ask you are you sure of that.

MR. WALLACE: It was not raised at the trial, your Honor.

MR. FEINBERG: Or prior thereto.

THE COURT: Or at any time.

--

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NO. 74 Cr. 388

UNITED STATES OF AMERICA,

Plaintiff,

v.

GILBERT FISHER,

Defendant.

NOTICE OF APPEAL

FRED L. WALLACE
200 West 135th Street Rm 218
New York, New York 10030
(212) 283-0600

Attorney for Defendant

UNITED STATES DISTRICT COURT

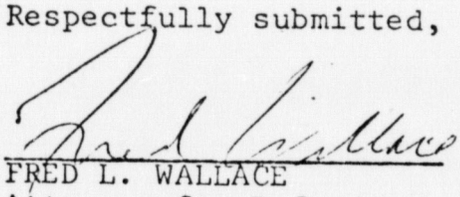
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	No. 74 Cr. 388
v.	NOTICE OF APPEAL
GILBERT FISHER,	
Defendant.	

Notice is hereby given that GILBERT FISHER, resident at 446 N. Woodland Street, Englewood, N.J. 07631, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit and from the Judgment of Conviction, entered in this action on 6th day of December, 1974.

Dated: New York, New York
December 16, 1974

Respectfully submitted,



FRED L. WALLACE
Attorney for Defendant

200 West 135th St., Rm 218
New York, N.Y. 10030
(212) 283-0600

OFFICE OF
CLERK OF THE SUPREME COURT
C. R. DAVENPORT, CLERK
CARSON CITY, NEVADA 89701

November 5, 1974

Mr. Fred Wallace
c/o Harlem Teams for
Self Help
179 West 137th Street
New York, New York 10030

Dear Mr. Wallace:

Re: Fisher v. Fisher, No. 7819

Pursuant to your telephonic request I am enclosing a certified copy of the record on appeal in the above entitled matter. Your telegraphic money order in the amount of $35.00 was received this day to cover the cost of the copy work.

Sincerely yours,

Judith McCulloch

Judith McCulloch
Deputy Clerk

jr
Enclosure

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, ...C. R. Davenport....., the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the Record on Appeal, in the matter of Rosalie Fisher v. Gilbert Fisher, No. 7819, Filed in the Supreme Court of the State of Nevada on July 23, 1974.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this .....5th.....day of .....November....., 19 74.

C. R. Davenport
Clerk of Supreme Court of the State of Nevada

By Judith McCulloch
Deputy

(Rev. 1-69)

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSALIE FISHER,) NO. 7819

Appellant,)

-vs-)

GILBERT FISHER,)

Respondent.)

FILED

JUL 23 1974

C. R. DAVENPORT
CLERK OF SUPREME COURT
BY Judith McCulloch
DEPUTY CLERK

RECORD ON APPEAL

T. DAVID HORTON
Attorney at Law
Post Office Box 157
Battle Mountain, Nevada 89820
Attorney for Appellant

COHEN & TERRY, Ltd.
Attorneys at Law
229 North Third Street
Las Vegas, Nevada 89101
Attorney for Respondent

JOHN F. SEXTON, DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSALIE FISHER,) NO. 7819

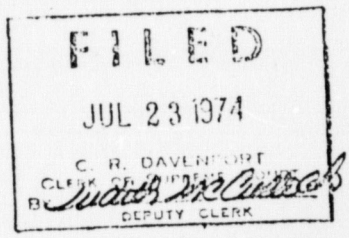
Appellant,)

-vs-)

GILBERT FISHER,)

Respondent.)

)



RECORD ON APPEAL

T. DAVID HORTON
Attorney at Law
Post Office Box 157
Battle Mountain, Nevada 89820
Attorney for Appellant

COHEN & TERRY, Ltd.
Attorneys at Law
229 North Third Street
Las Vegas, Nevada 89101
Attorney for Respondent

JOHN F. SEXTON, DISTRICT JUDGE

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CLERK'S CERTIFICATE

STATE OF NEVADA)
: ss
COUNTY OF LANDER)

I, EMMA F. GANDOLFO, County Clerk of said County and State, and ex-officio Clerk of the Third Judicial District Court of the State of Nevada, in and for the County of Lander, do hereby certify the following to be the original papers constituting the RECORD ON APPEAL as hereby designated in the cause entitled ROSALIE FISHER, Appellant. -vs- GILBERT FISHER, Respondent, as filed and of record in my office in said Civil Action No. 3487.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court on this 15th day of July, A.D. 1974.

Emma F. Gandolfo CLERK

CASE NO. _____

NO. 3659

FILED: [illegible]

[illegible]
Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,

Plaintiff,

-vs-

ROSALIE FISHER,

Defendant.

COMPLAINT FOR DIVORCE

I. That the Plaintiff is now, and for more than six (6) weeks prior to the commencement of this action, has been an actual, bona fide resident of the County of Clark, State of Nevada, and during all of said period of time has been actually, physically and corporally present and residing in the State of Nevada.

II. That Plaintiff and Defendant were intermarried on the 4th day of February, 1942, in the City of New York, State of New York, and ever since that time have been, and still are, husband and wife.

III. There are no minor children the issue of this marriage.

IV. There is no community property of the Parties hereto to be adjudicated by this Court.

V. That Plaintiff and Defendant are incompatible and their tastes, natures, views, likes and dislikes have become widely separate and divergent so that the Parties hereto have been and now are incompatible to such an extent that it is impossible for them to live together as husband and wife; that it now appears that there is no possibility of reconciliation

OHEN & TERRY, LTD.
ATTORNEYS AT LAW
128 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

between the Parties hereto, and there remains such an incompatible temperament between the Parties hereto that a happy marital status can no longer exist.

VI. That the Parties hereto have lived separate and apart from each other for a period of more than one (1) year prior to the commencement of this action.

WHEREFORE, Plaintiff prays judgment:

1. That the bonds of matrimony now and heretofore existing between the Plaintiff and Defendant be dissolved, and that the Plaintiff be granted an absolute Decree of Divorce, and that each of the Parties hereto be restored to the status of a single, unmarried person.

2. For such other and further relief as to the Court may seem fair, just and equitable in the premises.

Gilbert Fisher
GILBERT FISHER
Plaintiff in Proper Person
Address: Pony Canyon Motel
Austin, Nevada

STATE OF NEVADA)
) SS:
COUNTY OF LANDER)

GILBERT FISHER, being first duly sworn, deposes and says: That he is the Plaintiff in the above entitled action; that he has read the foregoing Complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

Gilbert Fisher
GILBERT FISHER

SUBSCRIBED AND SWORN to before me
this 17 day of April, 1972.

NOTARY PUBLIC in and for said
County and State

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

TRIP

TO

FROM

OFFICE OF CLERK
LANDER COUNTY
AUSTIN, NEVADA 89310

SUBJECT

DATE / /

MESSAGE

SIGNED

REPLY

SIGNED

DATE / /

CENTRAL NEVADA NEWSPAPERS

3

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,	)	NO. 3684
Plaintiff,	)	Filed: June 9, 1972
-vs-	)	[illegible] CLERK
ROSALIE FISHER,	)	By: [illegible] Deputy
Defendant.	)	
	)	

ANSWER AND COUNTERCLAIM

COMES NOW Defendant above named, by and through her attorney, T. DAVID HORTON, and in answer and counterclaim to the Complaint herein exhibited against her, affirms, denies and alleges as follows:

ANSWER

1. Defendant denies the allegations of Paragraph I. of Plaintiff's Complaint for Divorce.

2. Defendant admits the allegations of Paragraph II. of the Complaint for Divorce herein.

3. Defendant admits the allegations of Paragraph III. of the Complaint for Divorce herein.

4. Defendant denies the allegations of Paragraph IV. of the Complaint for Divorce herein.

5. Defendant denies the allegations of Paragraphs V. and VI. of the Complaint for Divorce on file herein.

COUNTERCLAIM

6. Defendant adopts the allegations of Paragraphs One (1) through Five (5) of her Answer herein above set forth.

7. Since the date of said marriage, Plaintiff has committed adultery, remaining unforgiven.

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

4

8. Approximately three (3) months ago, Plaintiff herein obtained from Defendant the sum of Seventy-five Thousand Dollars ($75,000.00) in cash. The terms under which said Plaintiff obtained said cash were false and deceptive, and Defendant is entitled to a return of said cash.

9. Plaintiff provided the funds for a variety store business operated at 136th Street in New York City under the name of Bernice Duncan, the paramour of Plaintiff. Said funds as provided by Plaintiff are community property gained by the parties hereto during their marriage, and Defendant is entitled to an award therefrom.

10. Defendant's expenses have exceeded Ten Thousand Dollars ($10,000.00) per year, and Defendant is entitled to an award of monthly maintenance in the amount of Eight Hundred Thirty Four Dollars ($834.00).

WHEREFORE, Defendant asks that the Complaint herein be dismissed with prejudice and that Defendant receive her costs of suit herein and a reasonable attorney's fee, or in the alternative, that Defendant be granted a decree of divorce from Plaintiff, awarded the return of the sum of Seventy-Five Thousand Dollars ($75,000.00) in cash, awarded a share of the funds provided for the variety store business on 136th Street; and awarded a monthly alimony in the amount of Eight Hundred Thirty Four Dollars ($834.00); costs of suit and general relief.

T. David Horton

T. DAVID HORTON
P.O. Box 157
Battle Mountain, Nevada 89820
ATTORNEY FOR DEFENDANT

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

VERIFICATION

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

ROSALIE FISHER being first duly sworn, deposes and says: That she has read the foregoing Answer and Counterclaim and that the same is true to the best of her knowledge, information and belief.

Rosalie Fisher
ROSALIE FISHER

Subscribed and Sworn to before me this 2nd day of June, 1972.

Kenneth E. Blair
NOTARY PUBLIC in and for said County and State.

KENNETH E. BLAIR
Notary Public, State of New York
No. 31-0793740
Qualified in New York County
Commission Expires March 30, 1973

ACKNOWLEDGMENT

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

Personally appeared before me, the undersigned Notary Public in and for said County and State, ROSALIE FISHER, known to me to be the person described in and who executed the foregoing instrument, who being first duly sworn deposed and said that she executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and Official Seal of my Office this 2nd day of June, 1972.

Kenneth E. Blair
NOTARY PUBLIC in and for said County and State.

KENNETH E. BLAIR
Notary Public, State of New York
No. 31-0793740
Qualified in New York County
Commission Expires March 30, 1973

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,	)	NO. 3684
Plaintiff,	)	Filed: June 9, 1972
-vs-	)	[illegible] CLERK
ROSALIE FISHER,	)	By: [illegible]
Defendant.	)	Deputy
	)	

MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT

COMES NOW, Defendant above named, by and through her Attorney T. DAVID HORTON and moves the Court to set aside the Default and Default Judgment herein, and as grounds therefor shows the Court as follows:

1. On or about April 28th, Defendant herein was served in New York City. On that date, Defendant's Attorney, Kenneth E. Bruce, Esq., wrote this Court requesting Leave to Appear in Defendant's behalf, and further requesting that if Leave to so appear be denied, that Notice thereof be provided "in time to avoid the entry of a Judgment on the Default of the Defendant." As more fully appears from the Affidavit of Kenneth E. Bruce, Esq., attached hereto and marked "Exhibit A", a "Special Appearance" prepared by the said Kenneth E. Bruce, Esq., was also sent to the Clerk for filing.

2. On or about May 5, 1972, the Clerk of this Court returned the "Special Appearance" on the ground that "it does not conform with Nevada Revised Statutes."

3. Thereafter, on or about the 19th day of May, 1972, this Defendant's Default was entered and Judgment by Default given.

4. In the "Special Appearance" attached hereto and made a part hereof, it is asserted that the Plaintiff has not "a bona

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

fide residence so that this Court could obtain jurisdiction. . ."

5. Plaintiff and Defendant have been married over thirty (30) years. There is substantial community property to distribute between the parties, and Plaintiff is entitled to an Order of Support from Defendant, and to an award of property obtained by the parties during their marriage, as more fully appears from the verified Answer to Complaint attached hereto and made a part hereof.

WHEREFORE, Defendant asks that a date be set for the Hearing of the within Motion; that the Default heretofore entered herein be set aside; that the attached verified Complaint be filed and that a Hearing on the merits of the within action be set at an early date.

Respectfully submitted,

T. David Horton

T. DAVID HORTON
P.O. Box 157
Battle Mountain, Nevada 89820
ATTORNEY FOR DEFENDANT

STATE OF NEW YORK)
: ss VERIFICATION
COUNTY OF NEW YORK)

ROSALIE FISHER being first duly sworn, deposes and says: That she has read the foregoing Motion to Set Aside Default and Default Judgment and knows the contents thereof and the same is true to the best of her knowledge, information and belief.

Rosalie Fisher

ROSALIE FISHER

Subscribed and Sworn to before me this 2nd day of June, 1972.

NOTARY PUBLIC in and for said County and State.

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT

NO. 2644

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

FILED: July 19 72

Clerk

KENNETH E. BRUCE, being first duly sworn, deposes and says:

1. On or about the 28th day of April, 1972, Affiant was consulted by Defendant herein, ROSALIE FISHER, concerning the Complaint herein which had been served upon said Defendant in New York City on or about the said 28th day of April, 1972.

2. Affiant is a member in good standing of the Bar of the State of New York, but is not a member of the Bar of the State of Nevada. On or about the 28th day of April, 1972, Affiant wrote to the Third Judicial District Court requesting Leave to Appear on behalf of said Defendant. Affiant forwarded a "Special Appearance", a copy of which Appearance was mailed to COHEN AND TERRY, ESQS., 229 North 3rd Street, Las Vegas, Nevada, 81910 and to the CLERK of this Court. Photocopies of the indicated letter and Special Appearance are attached hereto and made a part hereof.

3. The Clerk did not file the "Special Appearance," but on or about the 5th day of May, 1972, said Clerk posted a letter returning the foregoing Special Appearance together with a memorandum attached hereto and bearing date of 5/5/72, stating that the Special Appearance," does not comply with Nevada Revised Statutes."

4. On or about the 20th day of May, 1972, the undersigned determined that the default of the Defendant herein had been entered the previous day. Affiant promptly contacted T. DAVID HORTON, ESQ., member of the Bar of this Court, to request him to move to set aside the Default and the Default Judgment.

5. Defendant has a meritorious defense as more fully appears from the Answer to Complaint filed herewith. Affiant has

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

Exhibit A

knowledge of property belonging to the parties hereto which has not been adjudicated in this action, and Affiant verily believes that Defendant is entitled to an award of community property of the parties hereto and to an award of alimony.

6. Additionally, the Special Appearance attached hereto shows the Plaintiff herein has failed to establish residence and that this Court therefore lacks jurisdiction in the premises.

WHEREFORE, Affiant asks that the Default and Judgment herein be set aside and that the accompanying Answer to Complaint and Counterclaim be filed with the Court making such ruling and ajudication thereon as may be just and proper in the premises.

KENNETH E. BRUCE, ESQ.

Subscribed and Sworn to before me this 2nd day of June, 1972.

NOTARY PUBLIC in and for said County and State.

CHRISTINA C. [illegible]
Notary Public, State of New York
No. 60-[illegible]
Qualified in Westchester County
[illegible]

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

Exhibit A

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POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT

1. Rule 55 NRCP
2. Rule 60 NRCP
3. Circerchia v. Circerchia, 70 Nev 158, 360 Pac 2d 839
4. Adams v. Lawson, 84 Nev 687, 448 Pac 2d 697
5. Howe v. Coldren, 4 Nev 171
6. State v. Consolidated Virginia Mining Company, 13 Nev 194
7. Horton v. Newpass Gold and Silver Mining Company, 21 Nev 184, 27 Pac 376
8. Stretch v. Montezuma Mining Company, 29 Nev 163, 86 Pac 445
9. Bowman v. Bowman, 47 Nev 207, 217 Pac 1102
10. Blakey v. Fremont Hotel Inc., 77 Nev 191, 360 Pac 2d 1039
11. Hotel Last Frontier Corp. v. Frontier Prop., 79 Nev 150, 380 Pac 2d 293
12. Intermountain Lumber & Builders Supply Inc., v. Glens Falls Insurance Company, 83 Nev 126, 424 Pac 2d 884
13. Minton v. Roliff, 86 Nev 478, 471 Pac 2d 209
14. Sherman v. Southern Pacific Company, 31 Nev 285 102 Pac 257
15. Whise v. Whise, 36 Nev 16, 131 Fac 967
16. Markwell v. Gray, 50 Nev 427, 265 Pac 705
17. Brockman v. Ullom, 52 Nev 267, 286 Pac 417
18. State Ex. Rel. v. Kerr vs. Second Judicial District Court, 32 Nev 189, 105 Pac 1022
19. Iveson v. Second Judicial District Court, 66 Nev 145, 206 Pac 755.

Respectfully submitted,

T. David Horton

T. DAVID HORTON
P.O. Box 157
Battle Mountain, Nevada 89820
ATTORNEY FOR DEFENDANT

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,

Plaintiff,

vs.

ROSALIE FISHER,

Defendant.

No. 3684

Filed: [illegible], 1972

[illegible] CLERK

By: [illegible] DEPUTY

NOTICE OF HEARING

TO: GILBERT FISHER and TONY G. TERRY, ATTORNEY AT LAW, Attorney for Plaintiff, 229 North Third Street, Las Vegas, Nevada 89101:

PLEASE TAKE NOTICE that the undersigned will bring on for hearing before the above entitled Court at the Courthouse thereof in Austin, Nevada on the 16th day of June, 1972 at the hour of 10:00 A. M., or as soon thereafter as the matter may be heard, the Defendant's Motion to Set Aside Default and Default Judgment.

DATED this 6th day of June, 1972.

T. DAVID HORTON
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Hearing was sent postage prepaid this 8th day of June, 1972 to TONY G. TERRY, COHEN AND TERRY, LTD., ATTORNEYS AT LAW, 229 NORTH THIRD STREET, LAS VEGAS, NEVADA 89101, counsel for the Plaintiff.

T. DAVID HORTON

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

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FILED: [illegible]

[illegible] Clerk

By [illegible] Deputy

CASE NO. 3684

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER, Plaintiff, vs. ROSALIE FISHER, Defendant	INTERROGATORIES

TO: LINDA WEBER

1. Please state your full name.

2. Please state where you reside.

3. Please state for what period of time you have resided in Clark County, Nevada.

4. Please state the first date upon which you first saw the Plaintiff physically present in Clark County, Nevada.

5. Please state for what length of time you saw the Plaintiff physically residing in the State of Nevada.

COHEN AND TERRY, Ltd.

By: [signature]
Attorneys for the Plaintiff
229 North Third Street
Las Vegas, Nevada 89101

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
228 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER, Plaintiff, vs. ROSALIE FISHER, Defendant.	No. 3684 Filed: June 26, 1972 [illegible] CLERK By: [illegible] DEPUTY

INTERROGATORIES

TO: LINDA WEBER

1. Where were you when you first saw Plaintiff Gilbert Fisher in Clark County, Nevada?

2. Who else was there?

3. List each and every other time you saw Plaintiff physically present in Clark County, Nevada.

4. State your relationship to the Plaintiff, his attorney, or any employee of his attorney.

5. What is your employment?

6. How long have you been in that employment?

7. Have you ever served as a resident witness in a divorce action, either personally, by Interrogatory or by Affidavit, if so, how many times?

8. State whether you will be available to testify, if Subpoenaed, before the above styled Court in Austin, Nevada on the 21st day of July, 1972 at the hour of 10 A. M.

T. David Horton

T. DAVID HORTON
P. O. Box 157
Battle Mountain, Nevada 89820
ATTORNEY FOR DEFENDANT

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Interrogatories was mailed, postage prepaid, this 23rd day of June, 1972 to TONY G. TERRY, ESQ., 229 North Third Street, Las Vegas, Nevada 89101, Attorney for Plaintiff.

T. DAVID HORTON

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,

Plaintiff,

vs.

ROSALIE FISHER,

Defendant.

No. 3684

Filed: _____

_____ CLERK

By: _____ DEPUTY

STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto that Defendant's Motion to Set Aside Default be granted and that trial herein be set for the 21st day of July, at the hour of 10 o'clock A. M., or as soon thereafter as the matter may be heard at the Courthouse hereof in Austin, Nevada.

DATED this 23rd day of June, 1972.

COHEN AND TERRY, LTD.

By: _____

TONY G. TERRY
229 North Third Street
Las Vegas, Nevada 89101
ATTORNEY FOR PLAINTIFF

_____

T. DAVID HORTON
P. O. Box 157
Battle Mountain, Nevada 89820
ATTORNEY FOR DEFENDANT

SO ORDERED this 27th day of _____, 1972.

_____

DISTRICT JUDGE

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

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FILED: .....

.....
Clerk

CASE NO. 3684

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,

Plaintiff,

vs.

ROSALIE FISHER,

Defendant

REPLY TO COUNTERCLAIM

COMES NOW THE PLAINTIFF, and for his Reply to the Counterclaim on file herein, admits, denies and alleges as follows:

I. Plaintiff admits each and every allegation contained in Paragraphs 7.

II. Plaintiff denies each and every allegation contained in Paragraph 8.

III. Plaintiff admits the allegation that he provided funds for a variety store located in New York City, but alleges that the Parties hereto settled their property rights by agreement in June of 1971, being after Plaintiff acquired said store.

IV. Plaintiff denies each and every allegation contained in Paragraph 10.

WHEREFORE, Plaintiff prays that Defendant take nothing by reason of her Counterclaim herein.

COHEN AND TERRY, Ltd.

By .....
Attorneys for Plaintiff
229 North Third Street
Las Vegas, Nevada 89101

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

GILBERT FISHER, being first duly sworn, deposes and says: That he is the Plaintiff in the above entitled action; that he has read the foregoing REPLY TO COUNTERCLAIM, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Notary Public - State of Nevada
CLARK COUNTY
STEVE MASSEY
My Commission Expires Nov. 6, 1972

GILBERT FISHER

Subscribed and Sworn to before me this 14th day of July, 1972.

NOTARY PUBLIC in and for said County and State

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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NO. [illegible]

CASE NO. 3684

FILED: [illegible]

[illegible]

Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,

Plaintiff,

vs.

ROSALIE FISHER,

Defendant.

ANSWERS TO INTERROGATORIES

TO: COHEN AND TERRY, Ltd.
Attorneys for Plaintiff
229 North Third Street
Las Vegas, Nevada 89101

COMES NOW, LINDA WEBER, who, having been duly sworn, in response to the Interrogatories served upon her in the above case, makes the following answers and responses.

INTERROGATORY NO. 1. Please state your full name.

ANSWER: (Mrs.) Linda Weber.

INTERROGATORY NO. 2. Please state where you reside.

ANSWER: 2216 Tam Drive, Apartment 5, Las Vegas, Nevada.

INTERROGATORY NO. 3. Please state for what period of time you have resided in Clark County, Nevada.

ANSWER: Two years and eleven months.

INTERROGATORY NO. 4. Please state the first date upon which you first saw the Plaintiff physically present in Clark County, Nevada.

ANSWER: March 5, 1972.

INTERROGATORY NO. 5. Please state for what length of time you saw the Plaintiff physically residing in the State of Nevada.

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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NO. ....

FILED: ....

Clerk

CASE NO. 3684

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,

Plaintiff,

vs.

ROSALIE FISHER,

Defendant.

ANSWERS TO INTERROGATORIES

TO: T. DAVID HORTON, ESQ. , Attorney for Defendant
P. O. Box 157
Battle Mountain, Nevada 89820

COMES NOW, LINDA WEBER, who, having been duly sworn, in response to the Interrogatories served upon her in the above case, makes the following answers and responses.

INTERROGATORY NO. 1. Where were you when you first saw Plaintiff Gilbert Fisher in Clark County, Nevada?

ANSWER: I was at work at Blair House, 344 Desert Inn Road, Las Vegas, Nevada.

INTERROGATORY NO. 2. Who else was there?

ANSWER: I do not recall who else was working on that date.

INTERROGATORY NO. 3. List each and every other time you saw Plaintiff physically present in Clark County, Nevada.

ANSWER: I saw him at least once a day each day from March 5, 1972 through and including April 17, 1972, and numerous days since that time.

INTERROGATORY NO. 4. State your relationship to the Plaintiff, his attorney, or any employee of his attorney.

ANSWER: None.

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
228 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-8484

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INTERROGATORY NO. 5: What is your employment?

ANSWER: Maid at Capri Motel, 3235 Fremont Street, Las Vegas, Nevada.

INTERROGATORY NO. 6: How long have you been in that employment?

ANSWER: Since July 1, 1972.

INTERROGATORY NO. 7: Have you ever served as a resident witness in a divorce action, either personally, by Interrogatory or by Affidavit, if so, how many times?

ANSWER: No.

INTERROGATORY NO. 8: State whether you will be available to testify, if Subpoenaed, before the above styled Court in Austin, Nevada, on the 21st day of July, 1972, at the hour of 10:00 A.M.

ANSWER: No, I work on that date.

Linda Weber
LINDA WEBER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

LINDA WEBER, being first duly sworn, deposes and says: That she is the resident witness for the Plaintiff in the above entitled action; that she has read the foregoing Answers to Interrogatories, knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters, she believes it to be true.

Linda Weber
LINDA WEBER

Subscribed and Sworn to before me this 14th day of July, 1972.

Steve Massey
NOTARY PUBLIC in and for said County and State

Notary Public - State of Nevada
CLARK COUNTY
STEVE MASSEY
My Commission Expires Nov. 8, 1972

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
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TELEPHONE 384-6484

ANSWER: I saw him every day from March 5, 1972, through and including April 17, 1972, and I have seen him on several occasions since that time in Clark County, Nevada.

Linda Weber
LINDA WEBER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

LINDA WEBER, being first duly sworn, deposes and says: That she is the resident witness for the Plaintiff in the above entitled action; that she has read the foregoing Answers to Interrogatories, knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters, she believes it to be true.

Linda Weber
LINDA WEBER

Subscribed and Sworn to before me
this 14th day of July, 1972.

Steve Massey
NOTARY PUBLIC in and for said
County and State

Notary Public - State of Nevada
CLARK COUNTY
STEVE MASSEY
My Commission Expires Nov. 6, 1972

COHEN & TERRY, LTD.
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CASE NO. 3684

FILED: Dec. 18 - 1972

Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF LANDER.

GILBERT FISHER,)

Plaintiff,)

vs.)

ROSALIE FISHER,)

Defendant.)

)

TRANSCRIPT OF PROCEEDINGS

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CASE NO. 3684

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,)

Plaintiff,)

vs.)

ROSALIE FISHER,)

Defendant.)

)

TRANSCRIPT OF PROCEEDINGS

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I N D E X

	DIRECT	CROSS
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FISHER, Rosalie (Adverse Witness)	44	
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CASE NO. 3684

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,
Plaintiff,
vs.
ROSALIE FISHER,
Defendant.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled action came on regularly for hearing on Friday, the 21st day of July, 1972, at the hour of 2:00 P. M., of said day, before the HONORABLE JOHN F. SEXTON, Judge of said Court.

The plaintiff was present in Court and represented by his Attorney, ROBERT COHEN and Associate STANLEY THOMAS.

The defendant was present in Court and represented by her Attorney, T. DAVID HORTON and Associate KENNETH E. BRUCE.

ALMA F. SEXTON, Official Reporter of the said Court, was present and acting as such, and the following proceedings were had and testimony taken, to-wit:

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THE COURT: Who represents the other?

MR. BRUCE: I am Kenneth Bruce, Your Honor, and a request will be made by Mr. Horton on behalf of Rosalie Fisher.

MR. HORTON: I will move as a preliminary matter, the admission of Mr. Bruce as my Associate.

MR. COHEN: I have the pleasure of introducing to the Court Stanley Thomas of New York, co-counsel, and I would like to move for his admission in this case, Your Honor.

THE COURT: And you have no objection to this?

MR. COHEN: No, we stipulate to it.

THE COURT: All right. What is the problem?

MR. COHEN: May we have just a minute, Your Honor?

THE COURT: Yes.

(Conference with clients.)

THE COURT: Now, do you want this reported?

MR. COHEN: No. We don't care about it being reported, and I do not ask that Mr. Thomas be admitted co-counsel to question, because his testimony may be required.

MR. HORTON: Well, we are in a similar position, so I don't know whether we will have to use Mr. Bruce or not for that purpose, but I think it would be a good idea if it were reported.

THE COURT: Well, I understand you will pay for it, or your client will pay for it?

MR. HORTON: That's correct.

THE COURT: All right. Now, what is the problem? What is involved?

MR. HORTON: Well, what basically the case is determined on is disposition of what would be community property of the parties.

Now, the information that I have is that the parties have been married for about thirty years; that when the plaintiff in this case, the husband, started into a certain business in New York, that his wife gave up employment there that was earning a respectible wage, and has not been employed since then except for a period of time when she was running a business that is now defunct. In other words, there is no history of employment of the counterclaimant here.

There appears to be last year a sum of $75,000.00 that was transferred to the plaintiff at a time when the defendant had no idea that he was going to file for a divorce, and according to the defendant's position, it was by way of a loan to help him get on his feet.

It appears that the plaintiff is well fixed and his residence in New Jersey is in the hundred thousand dollar class, with a swimming pool and he works. He has been cohabiting for some period of time with a lady who has believed to bore him two children, and --

THE COURT: Well they are both adults, aren't they?

MR. HORTON: Pardon?

THE COURT: Are they adults?

MR. HORTON: No, I think they are minor children.

THE COURT: Well, the allegation is there are no minor children.

MR. COHEN: These are of another union, Your Honor, since the separation.

THE COURT: Oh.

MR. HORTON: The two children are of a woman named Duncan, and there is in the reply to the counterclaim an admission that the plaintiff also provided funds for a variety store in New York City, and it appears at this point that there not being any provision made for the support and maintenance of the soon to be divorced wife, that there hasn't been any support payments made since I believe, about 1969, $5,000.00 was given and a Cadillac, and there has been nothing since then. The counterclaim asks for support money in the amount of $10,000.00 a year be awarded to the counterclaimant, and that the $75,000.00 that was advanced last year, I believe in Mr. Bruce's presence, be returned, and this is the nature of the controversy. I believe that the plaintiff, Mr. Fisher, doesn't wish to make any provision for his wife, and we feel that in view of the fact that Mrs. Fisher worked very hard in this business, which is sometimes referred to as the numbers business, and had frequent occasion to bail plaintiff out of jail and was an integral part of this enterprise and exposed to risk and gave up earning capacity in order to further it, that she shouldn't be left out of anything of the proceeds of a thirty year marriage. Does that about summarize it?

MR. BRUCE: I think it does, Your Honor.

THE COURT: Does that summarize it for you? Is that substantially correct?

MR. COHEN: If the Court please, I have to point out that what counsel say is not testimony. We are going to prove that these people split up years ago. We are further going to prove that there was transfer of money and

property in an informal settlement between them, and we are further going to prove that there is nothing to divide up at this time.

THE COURT: Well, they mention in this reply to the counterclaim that the property rights were settled by agreement. Is that by oral or verbal agreement, or what is it?

MR. HORTON: Well, we say that there was no settlement of property rights.

THE COURT: Well, I mean is there no evidence of the original settlement?

MR. COHEN: There is a transfer of property and a transfer of money. Is that right, Counsel?

MR. THOMAS: That's correct.

MR. HORTON: The significance of this transfer, as I understand it, all there is is a dismissal of the action that doesn't specify what is supposed to be standing on what basis. Our position is that these funds were advanced as a loan, and their position would be that they were in settlement as a property settlement, I suppose, but this is a contested matter as to what the significance was.

MR. COHEN: Your Honor, we have a release as of that date. We would like to offer testimony as to this significance. May we have Mr. Thomas testify?

THE COURT: Well, let's swear in all of the people who will testify.

STANLEY THOMAS

called as a witness in behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. COHEN: Mr. Thomas, I would like you to testify concerning what led up to this release.

A. I instituted this suit for $193,000.00, which Rosalie Fisher, the defendant here, according to the plaintiff, was keeping for him. It was his money, and subsequent to the institution of the suit, I conferred with the Attorney for the defendant, and on June 9th after several discussions we appeared at his office and after much discussion it was decided that of the $193,000.00 that was sued for, the plaintiff here would get $75,000.00 and after he got the $75,000.00 of his own money, we signed a release so that there would not be a coming again for the $75,000.00. That release would not have been signed by the defendant or Mr. Fisher, had he not obtained the settlement of $75,000.00, and that settlement of $75,000.00 out of $193,000.00 was a settlement to settle all relationship with the defendant, and although it appears for One Dollar, I don't see what we would want to -- what we would do about putting a One Dollar general release. It must indicate more than that, and that's how that release was signed.

Q. Mr. Thomas, were the parties living apart at that time?

A. They were definitely living apart at that time.

Q. When did they separate?

A. Some time around 1963 or '4. To my knowledge, around 1963 or '4, because the children were there talking about it. One of them was born in 1963. The other one, I believe was born in 1962.

Q. Was there a transfer of properties in connection

with this release also?

A. In addition to that, Your Honor, two houses were owned by entirety by the plaintiff and the defendant, and to cut the tie thoroughly, one of the houses by both of them was deeded to each other. In other words, house number A in the name of Gilbert and Rosalie Fisher was deeded to Gilbert Fisher, and house number B of Gilbert and Rosalie Fisher was deeded to Rosalie Fisher, so there was a cut off completely, and to my knowledge, there was a settlement of $120,000.00 on these deeds. $120,000.00, Your Honor, that she obtained, and in addition to that, at the date that this was done on June 9th, I said to her, Well you got $120,000.00, and she said yes.

MR. COHEN: Nothing further on this point.

CROSS-EXAMINATION

MR. HORTON: Q. Now, Mr. Thomas, you say that the counterclaimant here had --

A. I didn't hear the second word that you said.

Q. You say that counterclaimant, that would be Mrs. Fisher here, had nearly $200,000.00 of what you describe as quote, his money, unquote. How do you know it was his money?

A. I don't know. I said he alleged.

Q. Oh, he alleged it was his money?

A. Yeah, alleged. Correct.

Q. In other words, you don't know whether she had it? You don't know of your own knowledge whether she had it?

A. I know of my own knowledge, because I questioned her, and she answered that she did, because after he had gotten $75,000.00, I said, Well, you have $120,000.00 of his

money, and she said yes. So, from her I understand that.

Q. In other words, you considered whatever this conversation was to be confirmation of your allegation that there was nearly $200,000.00 --

A. Correct.

Q. of his money?

A. Of his money.

Q. Where did he get this money?

A. I don't know where he got this money.

MR. COHEN: I object to this, Your Honor.

MR. HORTON: Q. Were they married at the time?

A. I assume so. They are married now.

Q. Now, I invite your attention to this letter that we will ask to be marked Counterclaimant's A --

THE COURT: Do you want this introduced as an exhibit?

MR. COHEN: Yes, Your Honor.

THE COURT: All right. Well let me ask you this. What is it that she wants?

MR. HORTON: She wants the money back that she gave at this time that she would not have surrendered had she understood that he was going to, as soon as he got the money, or shortly thereafter, commence suit for divorce. She would like to have an award of alimony that would be commensurate with the standard of living that they were able to maintain and as commensurate with the standard of living that the plaintiff now maintains, rather than to continue to live or to try to provide for herself.

THE COURT: Well, have you tried to negotiate a settlement?

MR. HORTON: We have discussed this, but the

information that I got from Mr. Terry was that Mr. Fisher was unwilling to make any provision.

MR. COHEN: Your Honor, unable. We are willing to give testimony that this man is barely making a living for himself, and there is really nothing to settle. This woman wants something of nothing, in addition to having $120,000.00. There is nothing now, and we are willing to prove his ability to pay. If Mr. Horton can prove that Mr. Fisher has more funds here now, we would like to hear the proof of his assets.

MR. HORTON: Q. Inviting your attention, Mr. Thomas, to Defendant's Exhibit A for Identification. Can you tell us whether you received the original of that letter?

A. I believe I received that letter.

Q. Did you receive that letter shortly after the date that it bears?

A. I believe so.

Q. Do you know where that original is now?

A. No, I don't know where it is now. I have a letter from Mr. Bruce dated March 24th.

MR. COHEN: Your Honor, I think both of these letters merely muddy the waters.

MR. HORTON: We are not talking about this letter. What we are talking about is Defendant's Exhibit A.

MR. COHEN: This is talk between lawyers.

MR. HORTON: Well, I think it bears on the questions of Mr. Thomas' testimony when he makes a description of what the $75,000.00 is all about. This puts a better light on the situation.

MR. COHEN: We have a general release that talks for itself.

MR. HORTON: The question is what is the significance of the release.

MR. COHEN: The release speaks for itself.

MR. HORTON: That's right. The release speaks for itself and there has to be an explanation for why the case was handled in the way in which it was rather than in some other way and the manner in which this particular letter shows the counterclaimant's position at the time, and I think it is a relevant point of cross-examination of the recipient of the letter.

MR. COHEN: You can cross-examine, but we are going to object to its use in evidence, because it would just destroy a formal release. It was issued not after the transfer of a few pennies, but many thousands of dollars.

THE COURT: I don't understand the whole thing, because she is going to deny she got anything and he is going to say he gave her something, right?

MR. COHEN: Yes.

THE COURT: So where are you going from there?

MR. HORTON: Well, the question would be, what was this $75,000.00. Was it a loan? Was it a loan between the parties while they were married?

THE COURT: Mr. Cohen said he doesn't have anything. What is she going to do about that?

MR. HORTON: Well this is another matter. This is another point of Mr. Thomas' testimony.

MR. COHEN: Is this lawsuit a suit on a note. Is this lawsuit a suit for a recovery of a loan?

MR. HORTON: No. It's a suit by way of counterclaim to obtain an equitable division of what had been community

property, where the wife in this particular case would receive something.

MR. COHEN: It has all been settled.

MR. HORTON: No, there has been a dismissal of a suit that was filed in New York. There hasn't been a satisfaction of all sums.

THE COURT: All right. Suppose that I gave her a judgment. What is she going to do with it if he shows no ability to pay it. I mean, if it gives her some satisfaction to get a judgment, but I know he will testify that he doesn't have anything.

MR. COHEN: He has a small business, Your Honor, where he is struggling, but he doesn't owe her any money, and the man does not want to be saddled with a judgment. He may have money in the future, when he doesn't owe it. He gave this woman a lot of money. Now she says that it was a loan, and does anybody pass out $75,000.00 without at least taking a note if it is a loan?

MR. HORTON: Between spouses and spouses.

MR. COHEN: And in the course of this suit, who ever heard of such passage of money without a note, if it is a loan.

MR. HORTON: Well then Mr. Cohen is saying on the one hand that his client would have given her $200,000.00 without a note, yet she wouldn't have given her husband $75,000.00 without a note.

MR. COHEN: They settled this through a release. This is no business transaction. It's a case of a wife getting money from a husband who has left her.

A. As a matter of fact, how does Mr. Horton account

for a release at the same time that the loan was given, which is - this is dated April 16th, which was nearly two months subsequent to that letter. How does he account for the release of everything that went before. The release states, if the Court has a copy of it, for everything. It's a release. How does he get over the release talking about a loan.

MR. HORTON: All it is is a settlement of a claim.

A. Well, then if it is a settlement of the claim then it's everything.

MR. BRUCE: I personally was involved in this matter. At the time that this controversy arose, the plaintiff, Mr. Fisher, had been asking his wife for moneys, certain moneys that he alleged that she had, so that he could defray certain expenses that were pending at that time. At the time that he was asking for these moneys, a letter did go out to Mr. Thomas from my office indicating in reference to a summons and complaint that was served on the defendant that any communication regarding this alleged money that was supposed to be held for the plaintiff by the wife, defendant wife, would be discussed at that time.

Now it is respectfully submitted that this release which is before the Court and marked into evidence is an informal release not spelling out the terms of a settlement, no more than a form which is used generally for negligence cases and not for the proposition that would provide for a wife who has been abandoned, as we contend she has been. She was left by this man, and out of the goodness of her heart that she released of her own moneys sheheld in her possession, $75,000.00 in cash, which was all the cash moneys that she

held. She had worked from the time of the marriage, far into the marriage which was thirty years ago. She left her employment, having married in 1942, she left at the behest of the defendant in 1947 or '8 her employment to come to work in the business that the plaintiff was conducting. She worked in that business until approximately 1967. They accumulated these moneys while they both were living together as man and wife. The had not separated until approximately about 1965. She left in 1966. She at the time when the demand for moneys were made on her to say, well I need these moneys for certain pending expenses desperately. She had me to write a letter, subsequent letter which is before the Court, which is dated April 16, 1971, and which I can identify as a letter that went out to the Attorney representing the plaintiff, indicating that she would be willing to loan any moeneys that she might be able to raise from the real estate holdings. Now, in my office at a certain date, releases were exchanged which would have been in an ordinary manner, because a suit had been commenced . A lawsuit had been commenced by the plaintiff against the defendant, his wife, and to settle that suit and to discontinue the suit, the release which is before the Court which was executed in my office was purporting to do only that, to only release any liability or claim under this lawsuit which had been commenced. In that lawsuit there was never any mention of moneys to be released or to be held on the basis of a coverture. It was a fact that our allegation was made that certain moneys were being held without proof, a mere allegation, being held unlawfully by this defendant wife, which moneys allegedly belonged to the plaintiff husband.

It is respectfully submitted again that these moneys, and I speak from a personal knowledge, having known both of the parties for, I would say approximately fifteen or sixteen years, that these moneys result from the joint operation of both the parties in this alleged business. Now it was never contemplated by the parties that this was gling to be a substitute for any formal agreement, or any settlement on this wife. This wife never knew at that time that a civorce was contemplated by the plaintiff. If she had known that this divorce proceeding would subsequently be initiated, she relying on this money as her sustainance, she being now fifty-two years of age, would never have loaned her husband the $75,000.00.

We now take the position that there has been no adequat e provision made for the defendant wife as to her support and maintenance, both from the point of view of the position that the plaintiff has today as to his living which is extraordinary, the fact that he has a business, that the fact that the defendant wife lives in a $118.00 a month apartment and has only approximately a $100.00 a month income resulting from the property that was conveyed to her after those dates, or rather, a quitclaim deed made of the interests of the plaintiff in and to that property which was purchased with joint funds of the plaintiff and the defendant. From those properties she has only the sum of $100.00 to maintain herself.

It is respectfully submitted again that due to the fact that she has been working for the plaintiff in his business since 1946 and she is now unemployable, having no particular skills and at fifty-two years of age there

has been no adequate provision made for her support and maintenance and that is the position that the parties are in.

THE COURT: Well, what does your client do?

MR. COHEN: It is a retail business now, is that correct, Mr. Fisher?

MR. FISHER: Yes.

MR. COHEN: Will you describe that business for the Court, please?

A. It's what is known as a variety store. If you walk in, you think it was a drug store. It has all the hair preparations and it has everything that a drug store has, except for a pharmacy, and I also sell television sets and radios and things like that. That is the business.

MR. THOMAS: Your Honor, may I say something?

THE COURT: Yes, go ahead.

MR. THOMAS: Your Honor, here is a complaint for a suit for $193,000.00 that was served on the defendant. That's item number one.

MR. COHEN: Q. What are your approximate earnings, Mr. Fisher, in your business?

MR. FISHER: A. I earn approximately $150.00 a week.

Q. Do you have any other income?

A. No, sir.

Q. Do you have any other assets?

A. No, sir.

Q. Was this the sole property that you had in your marriage?

MR. THOMAS: Prior to that time, Your Honor, here is a registered letter sent from Mrs. Fisher talking about

the money that she was withholding, and will the Court please note that $193,000.00 is mentioned in there.

Thirdly, Your Honor, here is a stipulation discontinuing the action, which is all that is necessary in the discontinuance of an action. You don't need a general release also, but we had a general release because of the claim for $193,000.00, of which showing the aid of $75,000.00. That's a stipulation discontinuing the action, and this is the normal way of stopping an action in New York. The release was for the money, and she would never have signed that release and he wouldn't if he didn't get part of that money.

In addition to that, here is a letter dated February 24th from my office to her, indicating that our claim was that that money was unlawfully withheld.

MR. COHEN: Q. Is it your testimony, Mr. Fisher, that your wife got $118,000.00 and you got $75,000.00 out of the money she was holding?

A. Yes, sir.

MR. THOMAS: And in addition to that, since Mr. Fisher and she were not living together, I understand that she has been taking trips. She owns a Cadillac. She owns that property that Mr. Bruce was talking about. There is no property in here whatsoever. None whatsoever.

MR. BRUCE: It is respectfully submitted, Your Honor, that the Cadillac was given to Mrs. Fisher by her husband, the plaintiff, in 1969, and that was the last time that there was any moneys given to her, any title value whatsoever. This woman has not been supported since 1969, at which time $5,000.00 was given to her by the plaintiff, and a Cadillac which she still has, which is a 1969 Cadillac.

MR. COHEN: I would represent to the Court that she has already gotten the best of the community property settlement. She got a hundred and eighteen and he got seventy-five.

MR. THOMAS: Exactly, and I told her that and she answered yes.

MR. BRUCE: I would like to ask Mr. Thomas a question.

Q. When was that statement made?

A. On June 9th, the date of the transfer of the property and the money.

Q. Where?

A. In your office.

MR. BRUCE: In my office. If Your Honor, please, at this time I have a very small office. Mrs. Fisher at all times was present in my office in my presence, and at no time did Mr. Thomas ever make any inquiry to Mrs. Fisher. At the time that Mr. Thomas came with his client, the plaintiff here, Mr. Fisher, there was no communication between Mr. Thomas and my client or Mr. Fisher and my client. When he left the office and my client remained behind, at that time she made payment to me of a fee, a counsel fee, which is in this, the amount which is significant.

If Your Honor please, at th is time I would like the record to reflect that I am an Attorney, having been admitted in 1950, and having practiced law in the State of New York, being a member of the Supreme Court of the United States, Southern District, Eastern District of the Federal System, having been a Referee in the Bronx Supreme Court and having an income in excess of $50,000.00 a year.

It is respectfully submitted at this time, Mrs. Fisher paid me a fee of $500.00 to represent her in this matter. It is also stated -

MR. COHEN: Your Honor, what is the relevancy?

MR. BRUCE: The relevancy is this, that if it had been a settlement of a $200,000.00 or $293,000.00 claim, it would never have been negotiated or settled on the basis of a $500.00 fee.

MR. THOMAS: Your Honor, may I state that on the date of June 9th, we were in Mr. Bruce's office no less than one and half hours, and that there was conversation between all four of us, between Mr. Fisher, Mrs. Fisher, myself and Mr. Fisher, myself and Mrs. Fisher and myself and Mr. Bruce. For one and half hours, I do not know how Mr. Bruce and say that he heard no conversation between Mrs. Fisher and me.

MR. COHEN: Perhaps I could bring things clearer for us, Your Honor. We all agreed in 1969, the wife got $118,000.00 --

MR. BRUCE: No, we object to that.

MR. COHEN: It is our contention that she got $118,000.00. We are prepared to prove it and take testimony. The husband got $75,000.00. There is not one iota of proof that he has one asset accumulated since that time. So what is before the Court?

MR. BRUCE: If it may please the Court, we have heard statements made that $118,000.00 was given to the wife. There has been no proof of any moneys passing to the wife. The only proof and allegations that we have heard before this Court has been the fact that it is uncontroverted that

Mrs. Fisher did give to her husband $75,000.00.

MR. THOMAS: Returned to her husband, Your Honor, not gave. Returned from the money of his he had.

MR. COHEN: Q. Mr. Fisher, what is your testimony as to what of your money your wife was holding at that time?

A. Well, I had a total of $193,700.00. This money was in a safe deposit box in her name. It was always my opinion that I never had to be vociferous or belligerent about that money, because I always thought that any time I wanted my half of the money I could get it. This was my entire attitude. My attitude was she could have half of it. I didn't want a hundred thousand dollars and give her fifty thousand dollars. Split it right down the middle. This was always my attitude, and as I say, that money had been in that safety deposit box for quite some time. I never sorried about it. There wasn't any worry in my mind that I was going to have problems getting my money, but like I say, this is what happened and this is why we're here.

Q. How much did she keep, Mr. Fisher?

A. She kept approximately $118,000.00.

MR. COHEN: Nothing further.

CROSS-EXAMINATION

MR. HORTON: Q. How do you know there was $193,700.00 in that safety deposit box ?

A. Well, before that we had been to an accountant, both of us.

Q. All right. Where did that money come from, Mr. Fisher?

MR. THOMAS: I object to that, Your Honor.

MR. HORTON: Q. Mr. Fisher, where did the money

come from?

MR. THOMAS: May we have a ruling on the objection?

MR. HORTON: What is the basis of the objection?

THE COURT: Well, can he answer it or not?

MR. COHEN: We will object on this basis. He has already stipulated that she had an interest in the money. What difference does the source make? It is community property.

THE COURT: Why don't you do this? I know what the testimony is going to be. She never got it, and he is going to say he gave it to her. Why don't you let me pass on this release and if I say it is good that winds up part of it, and if it isn't you can get depositions and take them on the rest of it.

MR. COHEN: We will stipulate to that.

MR. HORTON: Well, as far as the release is concerned, we would like to bring out some points so far as the handling of the funds, where the plaintiff's present assets came from, what happened to the $75,000.00, how he got a hundred thousand dollar house, and how much is invested in the variety store that he talks about that is not community property. What does this amount to? Counsel has said that what good will a judgment be if the defendant has no assets. That question answers itself, but this is no excuse for not getting a judgment. We are willing to find out -

MR. COHEN: That is not our position at all. We are saying that there should be no judgment at all.

MR. HORTON: Contending that he is making $150.00 a week. Well, he didn't get $193.700 by making $150.00 a

week, particularly when he is supporting two kids and another woman in another place in New York. This isn't done on $150.00 a week. If there is $193,700.00 and he has a hundred thousand dollar house, and if he's got a business in New York in which he funded out of what had to be community property, then she is entitled to a share of it. This verified complaint just says that there is $193,000.00 and she hasn't turned anything over of that $193,000.00. This isn't a property settlement agreement --

MR. THOMAS: I object to that statement, Your Honor. This isn't a true statement of the complaint.

MR. HORTON: This isn't a separate maintenance agreement. Now they are trying to represent that because between spouses at a given time there was a transfer of $75,000.00, that this necessarily means that that is a property settlement and wife support agreement, which it clearly is not. Even taking the verified complaint at its face value, it doesn't even pretend to be a separate maintenance agreement. What we are contesting over now are two things, the defendant's ability to replace as the allege is made, and what assets are there to be distributed, and if he's had the assets, if he's had the $75,000.00 as recently as last year, we think we are entitled to inquire into it and find out what happened to it. And we are also entitled --

THE COURT: Well, why don't you ask him about the $75,000.00, if he ever had it.

MR. HORTON: Well it's been admitted that he received $75,000.00 from Mrs. Fisher, because everybody was in the room when that happened.

THE COURT: Is that right?

MR. THOMAS: Yes, he received $75,000.00 in June, 1971, and he let her keep $118,000.00.

MR. BRUCE: I object to that, Your Honor, There has been no proof whatsoever that $118,000.00 was transferred from Mr. Fisher to Mrs. Fisher. All that we have is that their allegation that Mrs. Fisher, the wife, is alleged to have had $193,000.00, which is completely self-serving. What we do know, and that there is no controversy about, that this woman out of the goodness of her heart took $75,000.00 and gave it to Mr. Fisher in my presence, and also a house that was worth about approximately about $20,000.00.

MR. COHEN: Did you in the same presence say to give all the money to Mr. Fisher, Counsel? Was this your advice at the time?

MR. BRUCE: May I answer that?

MR. COHEN: Please do.

MR. BRUCE: Yes. Now you asked me whether it was my advice to this lady -

MR. COHEN: Right.

MR. BRUCE: To give the $75,000.00.

MR. COHEN: All of the money.

MR. BRUCE: I say this to you, Counsel that this woman is fifty-two years of age, a perfect manager of her business. This is an emotional situation existing between spouses. I do not interfere as to advising whether to give all her money. She stated and had me to direct in a letter, and the letter is before the Court --

MR. THOMAS: We object to this, Your Honor.

MR. BRUCE: Stating that within the terms and implications that Mrs. Fisher is willing to loan to Mr. Fisher. Mrs. Fisher loves her husband. She has not made any other relationship, whether it be legitimate or illegitimate. She has hoped her husband would come back to her and under the exigencies of the circumstances that she and her husband have both discussed prior to this it was not my position to advise her to give the money or not to give the money. It's not my concern.

MR. COHEN: Counsel, have you arranged other $75,000.00 loans without notes?

MR. BRUCE: This was an informal situation between the parties to make a loan. These people had been married thirty years, and they had been in business together up till 1966, when the plaintiff abandoned the defendant.

MR. COHEN: You said it was informal. They both had their own lawyers and negotiated verbally for the $75,000.00.

THE COURT: Well, wait. Let me say something. You don't have community property in New York, right.

MR. BRUCE: We do not.

THE COURT: But you keep calling it community property. Now in the State of Nevada, the husband has control and disposition of all the property.

MR. HORTON: The community property, but the disposition of the personal property between the parties would be weakened then distributed on the basis of Nevada law.

MR. COHEN: No, New York law. We follow the law if the property is hers, yes.

THE COURT: Well the husband in Nevada has control and disposition. He can blow the whole works.

MR. HORTON: All right. But he has to make provision for his wife, and if he has --

THE COURT: Well suppose he has blown all the community property. What does he do then?

MR. HORTON: Well if he has blown all of the community property, then she should be at liberty to go get this house over in New Jersey.

THE COURT: What is it she wants now, the house?

MR. HORTON: She wants maintenance and support and the return of $75,000.00.

THE COURT: What is the house worth?

MR. BRUCE: $100,000.00.

MR. FISHER: No. She couldn't touch it with a ten foot pole. That house belongs to my children. She couldn't touch it with a ten foot pole.

MR. THOMAS: May I say this, Your Honor? Mr. Bruce wants us to believe that Mrs. Fisher would say that he received $75,000.00, but to serv him with a self-serving declaration as he calls it, of a letter written by him that proves nothing, he doesn't want to believe Mr. Fisher that $118,000.00 of his money was kept by his wife. If he's going to believe the $75,000.00, then he must believe the testimony is proof that she kept $118,000.00, and this is in my testimony of my questioning of her and her answer, so we have testimony of two people that she kept $118,000.00.

MR. HORTON: He saw the $75,000.00. There is only Mr. Fisher's assertion as to the $118,000.00.

MR. COHEN: But now we have an admission by the wife.

MR. HORTON: Well we have Mr. Fisher's lawyer's statement.

THE COURT: Is the house free and clear? Is it all paid for and no encumbrances?

MR. COHEN: He owns no house. There is no house owned.

MR. HORTON: Well this house that he says belongs to his children, are these the children of --

MR. COHEN: He says it is their house, not his house.

MR. HORTON: How old are these children?

MR. THOMAS: Well do you have a deed in his name to the house?

THE COURT: Well I can't do anything about real property in New York.

MR. HORTON: Both parties are before the Court if you direct the distribution of assets.

THE COURT: Well I know, but he claims he doesn't even have a house.

MR. HORTON: He claims it's a house that his children own. I want to find out how old these children are.

Q. Are these the ten and eleven year old children that you had by this other woman?

MR. THOMAS: Your Honor, if he knows this house belongs to the plaintiff, may he give proof?

MR. COHEN: In any event, I am able to do so on authorities if the Court please, that where community property is in another State - where property of the parties is in another State which was the abode of the parties before this Court, the Nevada Court will follow the law of New York.

MR. BRUCE: It was not the abode, sir. This house

was built by this gentleman subsequent to the abandonment of the wife.

MR. THOMAS: I object to that, Your Honor. There is no proof it was built after the abandonment.

MR. COHEN: We say there is no community property. That's our position. There is no community property.

MR. HORTON: Well there is plenty of property that these two people had control of when they were married at one time or another.

MR. COHEN: Rich people become poor and poor people become rich.

MR. HORTON: Well yes. Rich people become poor when they go to divorce Court.

MR. COHEN: We are talking about today what there is.

MR. HORTON: But so far as proceeding on the basis that Mr. Fisher comes in and says I make $150.00 a week. I may be living in a $100,000.00 home and maybe conducting a business in New York City that the decision or ruling as to how the support should go would be based upon these representations --

THE COURT: Have you any evidence to prove contrary that he makes more than $150.00 a week?

MR. HORTON: We propose to put it on, yes.

THE COURT: What do you have?

MR. HORTON: Lots of evidence, that $193,000.00 doesn't come from $150.00 a week. That the business that the parties were engaged in was quite lucrative and brought in large sums of money.

MR. THOMAS: That's a year ago. That's not now.

MR. HORTON: The proceeds of which he's got and

she has nothing.

MR. BRUCE: If Your Honor pleases, before the Court is the admission that the plaintiff has a home that was deeded to him by the wife. Now what has happened to the income? That was income producing property. The fact that he had $75,000.00a year ago, what has happened to the $75,000.00? He has this lady, the mother of the two children he supports in a hundred thousand dollar house, in a hundred thousand dollar house that has a ten thousand dollar pool.

MR. COHEN: You can ask these questions of Mr. Fisher, Counsel. Ask Mr. Fisher these questions. Please do.

MR. HORTON: Mr. Fisher isn't the only source of information before the Court, and I think we should have before the Court some picture of what the total assets are, so that we are not just going on the basis of oh, I might have had some money a couple of years ago.

MR. BRUCE: May I ask this question of Mr. Fisher?

Q. What are the taxes that you pay for the home that's located in New Jersey that is supposed to the property of your children?

A. I don't pay any taxes.

Q. Does that home have a swimming pool?

A. Yes.

Q. And do you live at that home?

THE COURT: Let Mr. Fisher answer.

MR. COHEN: Go ahead and testify, Mr. Fisher.

MR. BRUCE: If Your Honor please, I am going to object to this kind of colloquy.

MR. THOMAS: Yes. All right. Please go on Mr. Bruce.

MR. BRUCE: Q. Who lives in that home in New Jersey

besides yourself, Mr. Fisher?

A. Who lives where?

Q. Who lives in that home in New Jersey, besides yourself?

A. Miss Bernice Duncan and two kids.

Q. And yourself?

A. I don't live there.

Q. And you support these two children?

A. That's right.

Q. And what are the taxes that are on this property?

A. I don't know. I don't pay them. You will have to ask my mother and father.

Q. What income does your mother and father have?

A. I don't know.

Q. How old is your mother and father?

A. My mother is 77 and my dad is 88, and I maintain a home for Bernice Duncan, the mother of these two children.

Q. And you don't live there?

A. No.

Q. Where do you live?

A. 470 Lennox Avenue.

Q. Now did there come a time when you had that home built?

A. What?

Q. Did there come a time when you had that home built in New Jersey?

A. No.

Q. You had nothing to do with the building of that home?

A. No.

Q. Well who did it, if you do know?

A. My mother and father.

Q. And did you counsel and aid them?

A. No. I had a lawyer.

Q. When was that home built, sir?

A. In approximately, I think, '67.

Q. '67 or '69?

A. 1967.

Q. '67, and at that time your mother and father were still at advanced age, were they not?

A. Yes.

Q. You say your mother now is 77 years of age and your father is 90?

A. My dad is 88.

Q. 88. So that home having been built some five years ago, your father then was 83 years of age and your mother was 72, and they built this home and swimming pool for themselves?

A. No.

Q. Who did they build the home for?

A. For Bernice Duncan and the two children.

Q. Where did they get the funds to build this home?

A. I don't know.

Q. What kind of work has your father done, sir?

A. My dad doesn't work.

Q. When was the last time he worked, do you know?

A. I don't remember.

Q. And your mother, when was the last time she worked?

A. I don't remember.

Q. All right now, sir. You visit this home, don't you?

A. On occasions.

Q. On occasions?

A. Umhmm.

Q. How many times would you say?

A. Whenever I feel like going over there.

Q. Now your two children live there, don't they?

A. Right.

Q. And you said these two children, that is their home?

A. Right.

Q. Those are the only two children you have?

A. Right.

Q. And you are very concerned with the maintenance and support of those two children?

A. Right.

MR. THOMAS: Your Honor, we object to this continued line of questioning. He said he does not own the home. It's not his.

MR. COHEN: It's been answered.

MR. BRUCE: If Your Honor, please, may I suggest this respectfully to the Court, that we are dealing here with the credibility of a witness, and this witness has stated before the Court that he is concerned, that that home is the home of his two children, and yet does he state that he goes in when he feels like it, only occasionally. Now I say that this shocks the conscience of the Court and insults it to the intelligence of the Court. Now this man has only two children, goes there occasionally when he

wants to. Two elderly persons, his mother and father build a home for their two grandchildren, which includes the swimming pool. It is respectfully submitted, Your Honor, this man cannot be believed as far as the testimony he has given. It is incredibile, absolutely incredibile and that there is gross consume that is being operated here. I have no further questions.

MR. HORTON: Q. Mr. Fisher, are you Gilbert Fisher, Jr.?

A. Yes, sir.

Q. Isn't it true that you are the trustee of 446 North Woodland Street in Inglewood?

A. Yes.

Q. And this is the home we have been talking about, isn't it?

A. Yes.

Q. Now, this Bernice Duncan, isn't she the mother of these two children?

A. Yes.

Q. And you as trustee then have legal title to that property, do you not? No, you must answer the question.

THE COURT: Well that's a legal --

MR. COHEN: It speaks for itself. You have a deed.

MR. HORTON: Q. Now you are the trustee?

A. Yes.

Q. And you say that your - do you know that your mother and father provided any funds for the building of that home?

A. Do I know whether they did or not?

Q. Yes.

A. They provided all the money.

Q. And you don't know where those funds came from?

A. I don't have the vaguest idea.

Q. And are your mother and father now paying the expenses of running that house?

A. I don't know.

Q. Are you paying them?

A. No, sir, I am not.

Q. With regard to the safety deposit box, I believe you testified that the safety deposit box was in Mrs. Fisher's name, is that correct?

A. Yes, sir.

Q. Did she have access to that box?

A. Yes, sir.

Q. Did you have access to that box? Were you on the signature card?

A. I was at one time.

Q. At the time it was purported to have contained $193,700.00, were you on the signature card?

A. No, sir.

Q. Did you have a key to the box?

A. No, sir.

Q. Is it true that around the time the $75,000.00 was transferred from Mrs. Fisher to you, that there were certain criminal charges pending against you?

MR. THOMAS: Your Honor, I object. I don't see the relevancy.

MR. HORTON: It has to do with motivation for this wife to give money to her husband. It has to do with credibility of the witnesses.

MR. COHEN: In what way would that have any relation, the fact that -

MR. HORTON: It shows motivation on his part and motivation on her part for the transfer of cash so as to defend him from criminal charges.

MR. COHEN: What difference does that make between a husband and wife?

MR. HORTON: It has to do with whether or not the $75,000.00 was a loan or whether the $75,000.00 was what even the complaint doesn't say, a property settlement agreement.

MR. THOMAS: I don't see the significance.

MR. HORTON: Well, I think we ought to be entitled -

MR. THOMAS: We are objecting. May we see what the Court says?

MR. HORTON: Yes.

THE COURT: Go ahead and answer it. You are not going to get any where with this case, because one is going to deny and the other is going to deny everything. Everything that is in a community state I will split it in half and let them fight it out.

MR. BRUCE: If Your Honor please, there has been an admission that this plaintiff is a trustee.

THE COURT: All right. Who is the trustor or who is the beneficiary?

MR. BRUCE: The children. The two children.

THE COURT: Who is the trustor, his parents?

MR. HORTON: Q. How did you become a trustee? Who gave you the deed to this place in Englewood, New Jersey?

A. Who gave me the deed?

Q. Yes. How did you get the deed?

A. It was my mother's wish and my father's wish.

Q. Did she sign the deed that made you trustee?

A. If I'm not mistaken, she signed the deed to the kids. I don't remember.

MR. HORTON: Now the witness has testified that he is trustee of this property. That means that, as the Court very well knows, that he holds legal title. Now, we need to find out where did this legal title come from.

MR. COHEN: I object, because the children, the beneficiary, the property couldn't be taken away from them anyhow. That would bring a suit in New York State where the property is, for fraudulent conveyance.

MR. BRUCE: Your Honor, if the illegitimate children of a father has no right in and to any estate of the father. Now there is a legal relationship -

MR. THOMAS: That's a wrong statement of the law, I believe. But at any rate, legal title means nothing as a trustee. It's the beneficial title that is the real title, not the legal title.

MR. COHEN: These kids own it. No matter whether they are children, illegitimate, or friends. They own it.

THE COURT: He has practically acknowledged that they are his children in this proceedings. I don't know where else he has acknowledged it.

MR. HORTON: Yes, but I don't think that this plaintiff is in a position to come into Court and say, I take a hundred thousand dollars of assets and some other takings and grant them to the illegitimate offspring of my girl friend while I'm going to be bright and abandon

my wife who helped make the money. Now this just doesn't fit in a situation like this.

THE COURT: What does the deed of trust recite the amount involved?

MR. HORTON: Well, this is what we need to know.

THE COURT: Where have you got the deed of trust?

MR. COHEN: Where is the proof? Where is the deed?

MR. BRUCE: He has it, because I'm not a producer.

MR. COHEN: You're offering proof here.

MR. BRUCE: He has offered the proof by his own testimony.

MR. COHEN: Bring a copy of the deed.

MR. HORTON: He has testified that he is the trustee.

THE COURT: Well, they are all recorded I suppose, aren't they?

MR. COHEN: The trustee owns nothing.

MR. THOMAS: That's right. He owns an empty title the trustee. It's the beneficial title that is important, and it had to come from someone. As Mr. Bruce has said that --

THE COURT: Well hasn't anybody got a copy of the deed of trust?

MR. HORTON: No, I haven't got a copy of the deed of trust. I have information that apparently comes from the tax roll that indicates that Mr. Fisher is the trustee, which is made up from the legal title.

MR. COHEN: Well that proves he is only a trustee, so what are you going to do with the man?

MR. HORTON: Well it proves that his kids are living

there and that his girl friend is living there, presumably with his parents who are not working and haven't been working, yet they live in a hundred thousand dollar house.

MR. THOMAS: Have you proof of the value of the house? Can you prove what it is worth?

MR. HORTON: Well we have Mr. Bruce who knows the neighborhood and what a house is worth in the neighborhood.

MR. THOMAS: Is he an expert?

MR. HORTON: Yes. I would say he is an expert. He is expert enough to know the neighborhood and knows the value of real property there.

MR. COHEN: Well we are not going to admit he is an expert.

MR. HORTON: Well he can testify -

THE COURT: Well if he had to be the trust you would have a recital in there, wouldn't you?

MR. COHEN: It wouldn't recite the consideration, Your Honor.

MR. HORTON: It's merely intended as a cover to keep the assets in the name of these two children.

THE COURT: Doesn't it say the amount of the consideration?

MR. BRUCE: No, it doesn't, Your Honor.

MR. THOMAS: Your Honor, it's property in another State and I don't think this Court can rule on it. I don't think so.

MR. HORTON: Well we have personal jurisdiction over the trustee.

THE COURT: Well, that may be, but if both parties even appear I don't believe that I could do anything with

the property.

MR. COHEN: That's just not to do with the parties here.

THE COURT: Well, all right. There is authority both ways.

MR. HORTON: Well the Court can make adjustments on that.

THE COURT: Reserving the right of the property to enjoin any - if they want, they can enjoin me in any order I make, regardless of how I distribute it.

MR. BRUCE: If the Court, please, may I be heard. If this Court were to enter a judgment or order a judgment to be entered enbodying a certain amount of money to be disbursed to the defendant, moneys that may or may not come from that property or divide that property, under the full faith and credit clause of the constitution, the State of New Jersey would be on a suit being brought on that judgment issuing out of the State of Nevada, that they would at that time be required to rule on whether they would give that judgment full faith and credit. Now I would submit, respectfully submit that as both parties in interest, the principals are here before the Court, and we are having a full litigation of this question that the State of New Jersey would, under the constitutional guarantee of full faith and credit, would have to give full faith and credit to any judgment or decree of the State of Nevada.

THE COURT: Well, they don't have to, because look at a lot of Nevada divorces are not recognized in some States, and they don't give full faith and credit to our

divorce decrees.

MR. BRUCE: If both parties are before the Court, Your Honor.

THE COURT: Oh, no, no.

MR. COHEN: How can our Court give away something that isn't owned by the husband. How can our Court give away something that isn't owned.

MR. HORTON: It is owned. He says he's trustee.

MR. COHEN: The trustee doesn't own it. He doesn't care if there is legal title.

MR. HORTON: He's got legal title.

MR. COHEN: Generally, if you don't think anything back there, if you don't think that was a proper conveyance, is to attack it in the home State.

MR. HORTON: If he has legal title and he is entitled to do a certain thing and he doesn't do it, and he wants the interjection of the New Jersey appellee Court, at that point he can come in and say that these equities are not assumed by the Nevada Court, as far as the ability of the Nevada Court to enter a decree where this man is before the Court and seeking relief here, the power of this Court to compel him to do equity is as extensive as it can be, or needs to be. So far as the ability of this Court to make an equitable determination of an equity proceeding, with both parties before the Court, can now, whether it's - he can go back to New Jersey and say now, there has been a decree saying that I should convey this or split it up in a certain way and my illegitimate offspring actually have a legal title to this that I gave them of property that I earned while I was in the numbers racket, and so

forth.. This is something for him to do at that particular point. If he wants to try to set it aside or get it modified, it's up to him to do it if he can, and he can do it back there where all of the evidence and where all the proof would be, but so far as the --

THE COURT: Well, if you want, I will enter a decree spitting the property up.

MR. HORTON: We would like this. Both the Inglewood property and also the variety store, because he's admitted that he had supplied the sums for the variety store.He's admitted in his answer that he supplied - that he funded this store, this shop in New York City that he's been testifying about, where they sell radios and where they sell sundries that you have in a drug store.

MR. THOMAS: Your Honor, may we state that variety store was obtained prior to the settlement with this woman.

MR. HORTON: If it is being obtained out of his property and if it is obtained out of what would be the community property of these parties, she would be entitled to a division.

MR. THOMAS: I object. There is no community property in New York. There is community property here.

MR. COHEN: Your Honor, I have recently went through a lawsuit with Mr. George Rudiak, an eminent attorney, counsel, similar facts to this, and after our brief was in, the Court agreed that where the property is in another State where there is no community property, the Nevada Court follows the ruling of the other State, and the community property rules in Nevada do not apply. I would

like an opportunity to submit a similar brief in this case. I ask that the testimony be taken here and that we have the opportunity of submitting a brief, and Mr. Horton have the opportunity to reply to it and give any points he wishes. We urge to the Court that we are prepared to show that the Nevada law is clear and settled that the law of the State respecting property applies in the Nevada Court, not our rules of community property, and that's why we have alleged there is no community property.

MR. HORTON: So far as the distribution of these two items is concerned, it is our position that so far as the variety store is concerned, this is personal property. It is not asserted that he owns the physical location, that the law of community property says that personal property follows the people that have this personal property. It would only be real property that might be in some cases subject to the long form if it is located in another place. Now, Counsel says that there was a decree in this other case. There is no decree here.

MR. COHEN: That's based on our briefs that the law of the State where the property is prevails.

THE COURT: Real and personal.

MR. COHEN: Real and personal.

MR. HORTON: Where there has been a decree.

MR. COHEN: And it is your burden to show that New Jersey and New York have community property laws.

MR. HORTON: No.

MR. COHEN: If you say that that your position is tenable.

MR. HORTON: No. No, we say that Nevada has personal

property law, and what is personal property and what goes with the persons of the litigants is personal property. Real property can stay in the site where it is located. There has been no decree here in either - in New Jersey with regard to the house in Inglewood, New Jersey. Now, we would submit and I would agree --

THE COURT: Well, I advise you to make some sort of a settlement. You are just going into more litigation.

MR. BRUCE: May we have, Your Honor, may I suggest this. That Your Honor has heard the testimony. I think it has been for this type of nature a proceeding rather lengthy. We do know that the plaintiff come to this before and he has elected this before and he is coming here seeking equitable relief. The wife has undertaken to appear in this proceeding. Both parties are before the Court. If the plaintiff is going to seek equity, I think in the spirits of justice and the administration of justice that he do equity.

Now we have a wife here that is before the Court, defendant wife, who has given - we haven't heard of any moneys being given or any proof or admission of that. He has given to the wife, but we certainly have proof which has been uncontroverted that she placed $75,000.00 in cash in hand--

MR. COHEN: I am addressing the Court, there has been testimony she got $118,000.00, so don't say there isn't any testimony she didn't get any money.

MR. BRUCE: If Your Honor, please, no one has seen the $118,000.00. Counsel has not seen it pass. This Counsel has not seen it pass. I have not seen it pass,

but there are two respected members in good standing in the New York State Bar who did see $75,000.00 pass from this defendant to that plaintiff and also a house pass from this defendant to that plaintiff. Now, if this plaintiff comes in seeking equity, then he's got to do equity. Now, I would suggest respectfully to the Court that we take ten minutes and see if we can't discuss this matter.

MR. COHEN: Just a moment. If the Court, please, I would like to introduce our formal testimony as to the basis of our lawsuit, and then I am going to ask that the Court reserve decision so we can submit a brief.

MR. HORTON: We would like to put on our testimony too, if the Court wishes to have a recess for a few minutes to have the parties discuss the matter.

THE COURT: What kind of testimony are you going to put on?

MR. HORTON: We are going to put on testimony to the effect that there was a lucrative business going on with these two parties involved; that there were large sums available, but the only source of income that this man had to either put in the variety store or put in this hundred thousand dollar house were those sources of income that came out of this business.

We are going to have testimony to the effect that this $75,000.00 came on representation that he was again having troubles with the law and needed these funds for legal expenses, and that this was what prompted the wife to desorb $75,000.00 in order to help keep her husband out of jail, and she had hopes at that time of reconciliation, that even though he had fathered children that she knew of,

and even though he was cohabiting with another woman, Miss Duncan, or whatever her name is, that she still did up to a certain period of time, she still did have him at her apartment, and that when he left, he even left all of his clothes there, but so far as the - and this split up came long after these children were born, so far as a formal no more cohabiting was concerned, and that so far as the ability of this plaintiff is concerned to provide, that it would be proper for this Court to enter an order dividing these two sourses of assets and for us to find out what we can make of them when we take them back East.

Now, so far as the requirements, the support requirements are concerned, we will show that they run roughly $10,000.00 in that neighborhood, $10,000.00 a year and that she should be entitled to be kept as well as the girl friend is being kept, and that on this basis we would ask for the splitting of the acquired property and we would ask for an award of maintenance, support and maintenance, and if the thing is going to go through protracted litigation, we would also ask for suit money pendente lite.

MR. THOMAS: Your Honor, may I ask a couple of questions, please?

MR. HORTON: I think that first, before cross-examination --

MR. THOMAS: May I ask a couple of questions?

MR. HORTON: Excuse me. I think we are entitled to have orderly proceedings so far as the handling of the testimony is concerned, and when we put Mrs. Fisher on, Counsel can cross-examine. I think that the thing

to do now is for Mr. Cohen to conclude his case, and to --

MR. THOMAS: Your Honor, I object to this, because Mr. Bruce has been asking the witness questions at length.

THE COURT: Well, go ahead. Let him ask what he wants. You might as well negotiate a settlement.

ROSALIE FISHER

defendant herein, called as an adverse witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. THOMAS: Q. Mrs. Fisher, did you go over-seas any time in the last year?

A. That's when I went over-seas in '65.

Q. Did you go over-seas at any time in the last year?

A. No, in '65.

Q. Did you go to Spain?

A. I went to Spain in '65. Mr. Fisher wanted to furnish a trip for me.

Q. You didn't go in 1971 or '72?

A. No.

Q. You are under oath, you know.

A. No, not in Spain.

Q. Well, did you go over-seas to Japan?

A. Japan? When?

Q. Any time within the last two years.

A. During the time that I was travelling, Mr. Fisher gave me the money to travel.

Q. Now listen to my question. It's the same question.

A. Right.

Q. Did you during 1971 or '72 go out of this country?

A. '71 or '72?

Q. Yes.

A. '72, no. '71, no. Wait, I don't remember '71.

Q. You realize you are under oath?

A. I understand I/m under oath.

Q. And you are telling me that you didn't go out of the country in 1971 or '72?

A. No, '72 I don't think I remember going out of the country.

Q. You don't remember?

A. No, because in '65 ,'66 and '67 --

Q. I'm talking about '71 and '72, did you go out of the country?

A. Not '72, no.

Q. You're positive?

A. Yes, that's what I'm thinking about now.

Q. Did you get a passport to go out of the country during '71 and '72?

A. I have my passport. It's good for five years.

Q. Did you use your passport in 1971 or '72?

A. Did I use my passport in '71 or '72?

MR. HORTON: I am going to object to the question. Now the use of a passport, you can use it for identification, or you can use it for a number of other things. What you are trying to ask, I think, is did you go out of the country with this passport in '71 or '72.

MR. THOMAS: Q. Did you use your passport in 1971 or '72?

A. 1971 I don't remember, because in '71 is the time when I gave Mr. Fisher all my money.

Q. Did you hear my question?

A. I heard your question. In '72, no.

Q. All right. How about '71?

A. I still say I don't remember, because that's the time when I gave up all my money.

Q. But you don't remember whether you went out of the country?

A. No, I doubt.

Q. And you understand what perjury is?

A. I just said that.

THE COURT: Well, she said she didn't remember. She didn't say she didn't.

MR. THOMAS: She didn't say she didn't. That's correct, Your Honor.

MR. COHEN: I would like to ask the basic questions of Mr. Fisher, Your Honor, for the record.

GILBERT FISHER

plaintiff herein, recalled as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. COHEN: Q. Are you Gilbert Fisher?

A. Yes, sir, I am.

Q. Were you physically present in Clark County, Nevada, daily from March 5, 1972, up to and including April 20, 1972?

A. Yes, sir, I was.

Q. Your residence was at the Blair House on Desert Inn Road, is that right?

A. Yes.

Q. Is everything in your complaint for divorce true?

A. Yes.

Q. Why do you want a divorce from your wife?

A. Well, I guess the word is incompatibility.

Q. Did she peck at you? Did you tell me she pecks at you?

A. I have been cursed at. I have almost been shot at, and I have been put out, and I just had a general miserable situation, that's all.

Q. When did your wife and yourself split up?

A. In approximately 1964.

Q. Now, what property do you own at the present time, Mr. Fisher, if any?

A. I have a variety store, and I have a house which is one of two houses that was given to me by my wife, and that's all I have.

Q. Where is this house that you got when you split up with your wife?

A. In New York City.

Q. Where is it located?

A. 636 West 158th Street.

Q. Is that a single family house?

A. It's a rooming house.

Q. What value does that have?

A. Well, I don't know. I think it's approximately $25,000.00. Mr. Bruce bought it for me.

Q. Did your wife get a corresponding property from you at that time? Another rooming house?

A. Yes, sir.

Q. At approximately the same value?

A. Yes, sir.

Q. Now, your variety store, what is that worth?

A. I guess you might say it is worth about $20,000.00.

Q. What other property do you have?

A. That's it.

Q. What other income do you have?

A. None at all.

Q. Is there any chance of a reconciliation with Mrs. Fisher?

A. No, sir.

Q. Now, you do have two children whom you acknowledge, is that right?

A. Yes, sir.

Q. What are their ages?

A. Eight and ten.

Q. And your parents are alive?

A. Yes, sir.

Q. What are their ages?

A. My mother is seventy-seven.

Q. And your father?

A. My father is eighty-eight.

Q. Was there a time when you helped in their support?

A. Oh, sure.

Q. At one time, you were a good money maker, is that right?

A. One of the best.

Q. How long ago was that?

A. Well, this was up until approximately three

years ago.

Q. What happened then?

A. Well, as things go, I am an illigitimate gambler and you begin to have an awful lot of trouble with the law and we had to close down the business. We closed it down temporarily. We opened it up again and we were locked up by the Federal Bureau of Investigation on October 8, 1970.

Q. How did that affect your income?

A. Well, it cut it out altogether. That was the end of that.

MR. COHEN: Your witness, Mr. Horton.

CROSS-EXAMINATION

MR. HORTON: Q. What charge were you locked up on in October, 1970?

A. Interstate travel to conduct a gambling game and conspiracy.

Q. Is that charge still pending?

A. No, sir.

Q. Were you convicted of that charge?

A. No, sir.

Q. Now, you say that you split up in 1964, when was the last time that you stayed over night with your wife, what date?

A. Oh, I couldn't remember that.

Q. Do you remember giving her a Cadillac in 1967?

A. No, sir.

Q. 1969?

A. Yes, sir.

Q. Do you remember giving her $5,000.00 then?

A. Yes, sir.

Q. When was the last time that you stayed over night at your wife's place?

A. I guess any given day in 1964.

Q. You haven't stayed over night in your wife's place since 1964?

A. No, sir.

Q. Now, is it true that you financed this travelling that Mrs. Fisher was talking about?

A. Yes, sir.

Q. That was out of the numbers income?

A. Yes, sir.

Q. Did Miss Duncan help you in the numbers business?

A. Yes, sir.

Q. Is she helping in the variety store?

A. Yes, sir.

Q. This $20,000.00 house, is this where you are staying?

A. No, sir.

Q. And the $20,000.00, is that the equity that is in the property, or is that the total value of the house?

A. No, that's the total value.

Q. Is it encumbered?

A. What do you mean?

Q. Do you own the house?

A. Me and the bank.

Q. You and the bank. How much does the bank own?

A. I think it has a mortgage now of about $7,000.00.

Q. What is your net income from that property?

A. Nothing.

Q. Is the property that was conveyed to your wife at the same time?

A. Sir?

Q. The property that was conveyed to your wife at the same time you got clear title to this one, now is it near by?

A. Well, it's about sixteen blocks away.

Q. Is it roughly the same value?

A. Yes, sir.

Q. Now, you say you have two houses. What are the two houses?

A. What two houses? I didn't say I had two houses.

Q. I have a note here that you said you have two houses that you got from your wife.

A. No, sir, just one house.

Q. What was your father's occupation?

A. My Daddy used to be an elevator operator.

MR. COHEN: I don't see the relevancy of this, Your Honor.

MR. HORTON: They are in a hundred thousand dollar house as opposed to five dollar funds. I think it is relevant.

THE COURT: Is it a hundred thousand dollar house?

A. No, sir.

MR. HORTON: Q. What did it cost?

A. I don't know.

Q. How do you know it wasn't a hundred thousand dollar house?

A. Well, I just say it wasn't.

Q. You just said it wasn't. What about the

neighborhood? Is it a good neighborhood?

A. It is nice.

Q. Is it a pretty good sized lot?

A. I don't know the exact measurements, you know what I mean.

Q. It's big enough for a swimming pool though?

THE COURT: Why don't you look on the revenue stamps or do something and you can tell.

MR. HORTON: Q. When your wife was working, Mr. Fisher, do you know what her income was?

A. Working where, sir?

Q. As a seamstress?

A. No, I don't. I never knew what she made.

Q. Has she had employment, to your knowledge, since 1949?

A. Yes, sir.

Q. What sort of employment?

A. Well, at that time we had a restaurant.

Q. In 1949?

A. Yes, sir -- no, no, let me get something straight. In 1950 we had a restaurant.

Q. Since 1950, has your wife worked for wages?

MR. THOMAS: Now, Your Honor, I object to twenty-two years ago questions about employment. It doesn't seem relevant to me.

MR. HORTON: It has to do with the wife's ability to provide for herself.

MR. THOMAS: Twenty-two years ago?

MR. HORTON: Exactly.

MR. THOMAS: I think it is too remote in time, Your

Honor, I object to that.

MR. HORTON: Q. Do you know of any job that your wife has had in the last twenty-two years where she worked for wages?

A. (No answer.)

Q. Do you understand the question?

A. Well, I don't know.

MR. COHEN: Does that infer it is sinful to work for wages?

MR. HORTON: Not in the least.

Q. Do you understand the question?

A. Yes, sir.

MR. HORTON: May we have a ruling as to whether the witness will answer the question.

THE COURT: Well, I don't get the relevance of it. I don't know where you are getting with this case. I don't know why you don't try to make a settlement on the thing. This can go on for twenty years. He will deny everything that she says about him and vice versa. I have listened to more divorce cases than anybody in the United States of America, and I know how they all go.

MR. BRUCE: Your Honor, may we have a ten minute recess?

THE COURT: Yes. That's a good idea.

* * * * * * * * *

4:05 P. M., JULY 21, 1972, THE COURT WAS CALLED TO ORDER AND THE FOLLOWING PROCEEDINGS WERE HAD:

MR. COHEN: Let's hear the rest of the case, Your Honor. We have nothing further.

MR . HORTON: We will offer in evidence, Defendant's

Exhibit A. This will be marked Defendant's Exhibit B, and we will ask that this photocopy be marked Exhibit C.

DIRECT EXAMINATION

MR. HORTON: Q. Mrs. Fisher, your husband testified that you split up in 1964. When did you and the plaintiff split up?

A. May 12, '67.

Q. When did you first start working in the numbers business?

A. In '60.

Q. And did you have any business before that?

A. Yes, fish and chip places.

Q. And when did you stop working at the tailor's?

A. In '48.

Q. And how long did you work with your husband?

A. From '48 up until '69.

Q. Until 1969?

A. Right.

Q. Now, when you were in the numbers business, what did you take in?

A. $3,000.00 per day.

Q. How long were you in this business, from what years to what years?

A. Oh, from '60 up until '69.

Q. Now inviting your attention to Defendant's Exhibit C for Identification, where did this come from?

A. This came from Hackensack, New Jersey Court records.

Q. How did you come to get that?

A. Going to Hackensack.

Q. What were you going for when you went to Hackensack?

A. The deed to the house in Inglewood, 446 North 29th.

Q. Now who are Gilbert Fisher, Sr., and Lula Fisher?

A. Gilbert Fisher, Sr., is Gilbert Fisher, Jr.'s father. Lula Fisher is Gilbert's mother.

MR. HORTON: We will offer Defendant's Exhibits A through C, Your Honor.

Q. Now, we have heard some statements about income that you have from the house. Your husband has testified that his rental property yields no net income. Approximately how much net income does your rental property yield?

A. My house?

Q. Yes.

A. Nothing at all.

Q. It, likewise, yields no income to you?

A. No. Right.

Q. Do you have an encumbrance on that? Do you have a mortgage on that?

A. Yes.

Q. How much is the mortgage payment?

A. $175.00 a month.

Q. So you may be making some equity build up in that house, but there is no net income to you from it, is that right?

A. Right.

Q. Now, how much does it cost you to live?

A. Weekly or monthly?

Q. Monthly or yearly.

A. Monthly, it costs me about $1200.00 per month.

Q. And where do you live?

A. 2119 Madison Avenue.

Q. What is the rent on the premises you occupy now?

A. $118.00 per month.

Q. Do you have a car payment that you have to make?

A. No.

Q. Are you still driving the car that Mr. Fisher gave y ou?

A. Yes.

Q. What has he contributed to your support and maintenance since he gave you the $5,000.00?

A. Nothing.

Q. During the years when you were employed with him in the numbers business, approximately how much did you spend per month for your living expenses?

A. Per month, it was about $1500.00 per month, with the two houses.

Q. Are you familiar with the location where the variety store is?

A. Yes.

Q. Is that location on a corner?

A. Yes.

Q. Is it a good location?

A. I think so.

Q. And does it do a good business, as far as you are able to determine?

A. I don't know.

MR. COHEN: I object for the reason --

MR. HORTON: Q. Do you know how many employees

are in there?

A. I don't know.

MR. COHEN: Objection, Your Honor, what bearing do the employees have here?

MR. HORTON: His testimony that that his claim his income is $150.00 a month.

THE COURT: Well, doesn't he file an income tax?

MR. HORTON: I suppose, but filing an income tax doesn't indicate his income.

MR. COHEN: It doesn't?

MR. HORTON: No.

MR. COHEN: If it doesn't, you will go to jail.

MR. HORTON: It indicates what you file with the Internal Revenue tax man.

MR. COHEN: Yes. I don't know of any better proof.

MR. HORTON: Q. Well, he further testified that you had $193,700.00 in a safety deposit box. Is this true?

A. None whatsoever.

Q. And you heard it testified to by your husband's attorney, that he said that you got $118,000.00 out of that deal, and that you said yes. Is this true?

A. Not true.

Q. How did this $75,000.00 that you gave to your husband come about?

A. That's from the accumulation from the business that I put aside for a rainy day, and after he came and asked me, that he needed money, that I would have to give him some money, so I went and got out all the money, plus a house, so that he could maneuver and do whatever to get him out of his troubles.

Q. What troubles did he say that he had at this time?

A. He just said that he had got i n trouble with the Feds, and that he needs money for an attorney.

Q. Now, if you had understood that Mr. Fisher was going to try to get a divorce without providing for your support and maintenance --

MR. COHEN: Object, Your Honor, this is improper.

MR. HORTON: That's due to the circumstances under which the witness separated herself from $75,000.00. She is entitled - she is competent to testify to what her motivation was and the circumstances surrounding the transfer. They didn't contradict it. They didn't say what it is supposed to be. I think it's time that we give the circumstances.

MR. COHEN: What has the divorce got to do with it?

MR. HORTON: The same thing that, the same all about what this claimed settlement was.

MR. COHEN: Let her testify.

THE COURT: All right. Go ahead and answer it.

MR . HORTON: I will rephrase the question.

Q. If y ou had understood at the time that your husband was going to bring this divorce action, and was not going to provide for your support and maintenance in that action, would you have conveyed the house to him?

A. No.

Q. Would you have given him the $75,000.00?

A. No.

Q. What was your reason at this time for giving the $75,000.00?

MR. THOMAS: We object. That's been answered. It's repetitious and it is also a product of her mind.

MR. HORTON: It's her testimony. It's supposed to be brought into this at this particular time.

MR. THOMAS: There is an objection before the Court.

THE COURT: What is this property here?

MR. HORTON: Q. Mrs. Fisher, is this the property that the girl friend and the two children are living in?

A. Right.

Q. Now, in 1967, was there a house on that property?

A. No, there was no house at all.

Q. In other words, that's a conveyance of a bare lot?

A. Yes.

Q. And the real property transfer tax on that, I believe, is something like $18.15?

THE COURT: Well, is this the hundred thousand dollar house you are talking about?

MR. HORTON: That's the lot for the hundred thousand dollar house.

THE COURT: I mean the house is on the hundred thousand?

MR. HORTON: Yes. That, I think, would indicate a sale price of about sixteen - five for the lot.

Q. Now, how old are you?

A. Fifty-two.

Q. What were you making when you quit y our work?

A. $90.00 per week.

Q. And that was in 1948?

A. Right.

84-77

Q. Are y ou now employed?

A. No.

Q. Do you have any special skill that you could use to make a living?

A. None whatsoever.

Q. What was your source of income from 1948 to the present time? Did you have any source of income other than the business of Mr. Fisher and yourself?

A. The business of Mr. Fisher.

Q. Since 1948?

A. Right, because during that time I was working with Mr. Fisher, for Mr. Fisher.

Q. Do you have any other source of income?

A. None.

MR. HORTON: Cross-examination.

CROSS-EXAMINATION.

MR. COHEN: Q. Is it your testimony that you had no income in 1971?

A. 1971 my income stopped, after I gave him one of the houses, of the two houses.

Q. How much income did you have in 1971?

A. That was a thousand dollars per month in the both houses in '71.

Q. That came to about $12,000.00 in '71, is that right?

A. Right.

Q. How about '72?

A. None whatsoever.

Q. Why?

A. Because I gave him one of the houses.

Q. Didn't you have $500.00 a month from the other house?

A. No.

Q. What happened?

A. I don't know. They just move in and move out. That's what happened.

Q. It was good in '71, and bad in '72, is th at right?

A. Right.

MR. THOMAS: Q. What year did you say you stopped working?

A. In '48 I stopped working for Whittier Brothers.

Q. And how did you get income after that?

A. After that we went into business.

Q. What kind of business?

A. Fish and chips.

Q. Fish and chips, and how long were you in that?

A. We worked in fish and chips thirteen years together.

Q. Well, that brough' it up to what year?

A. That brought it up into 1960.

Q. You left Whittier Brothers in what year?

A. '48.

Q. And then you went into what, the fish and chip business?

A. Right.

Q. Until when?

A. '60.

Q. 1960?

A. 1960.

Q. I see. Do you sew? Are you a seamstress?

A. Yes, for myself.

Q. Do you make your own clothes?

A. Some times.

Q. Did you ever make clothes for other people?

A. No.

Q. Now, in 1970, what was your income?

A. My income for 1970, it was $1,000.00 per month, from the two houses.

Q. In other words, you received $500.00 a month for each house?

A. Right.

Q. And now you don't receive anything from the house?

A. I receive $500.00 from one house, but that's for the expenses for the house.

Q. I am talking about net income, now that's after you take out expenses.

A. Net income is nothing.

Q. Nothing?

A. Right.

Q. But in 1970 and '71, it was $500.00 a month, is that right?

A. Right.

Q. I see. Now --

MR. COHEN: Now, do you recall whether you took a trip out of the country in 1971, or not?

A. I don't recall in '71.

Q. Are these not the deeds where you took one of the buildings and your husband took the other?

A. Yes. 511 is mine. 636 is his.

MR. COHEN: I would like to offer these in evidence, any objection?

MR. HORTON: No objection. Those are already in, are there going to be two and three more? We have one -

MR. COHEN: I am going to offer this material, of course, on our pleadings on the lawsuit.

MR. HORTON: I don't think they have been identified yet.

MR. COHEN: No, they haven't been. This will be one and two. We will offer in evidence plaintiff's Exhibits A and B.

MR. HORTON: No objection.

MR. THOMAS: I would like to offer these instruments here.

THE COURT: We are not getting any where with this. What do you suggest that we do? I made my suggestion. Where is she going to get this money that he says he hasn't got?

MR. HORTON: Well, I think if he will convey the house back, which would maybe make it a feasible operation again -

THE COURT: Are you willing to do that?

MR. HORTON: And if we can get - she gets half of whatever he has in the variety store and half of whatever we can show that he put into the house in Inglewood, New Jersey.

MR. THOMAS: Your Honor, we will consider giving the house back, but that's as far as we can go.

MR. COHEN: I would advise him not to do that. Not to give the house back. It's not his.

MR. THOMAS: We are talking about the house that was deeded.

(Discussion off the record.)

MR. HORTON: Do we have a stipulation that she gets the house, $2500.00 and no alimony?

MR. THOMAS: Right. The decree won't be entered until we have the deed and the money.

THE COURT: As soon as you notify me, I will sign the decree.

MR. THOMAS: We will do it now.

MR. BRUCE: That's all right. Let's do it now.

THE COURT: Why don't we follow the original suggestion. When Mr. Bruce gets the money and the deed we will sign the decree.

MR. THOMAS: If Mr. Bruce will notify him in twenty-four hours.

MR. BRUCE: I will stipulate that you will be notified within twenty-four hours and the deed has been signed. We want to run a title search.

THE COURT: All right.

* * * * * * *

STATE OF NEVADA,)
LANDER,) ss.
County of ~~Washoe~~)

I, ALMA F. SEXTON, Official Reporter of the ~~Second~~ Third Judicial District Court of the State of Nevada, in and for the County of ~~Washoe~~ Lander DO HEREBY CERTIFY:

That as such reporter I was present in Department No. of the above-entitled court on Friday, the 21st day of July, 1972, at the hour of 2:00 o'clock P. M., of said day and that I then and there took verbatim ~~stenotype~~ shorthand notes of the proceedings had and testimony given therein upon the trial of the case of Gilbert Fisher, Plaintiff, vs. Rosalie Fisher, Defendant.

That the foregoing transcript, consisting of pages numbered 1 to 64 both inclusive, is a full, true and correct transcription of my said ~~steno~~ shorthand ~~typy~~ notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 8th day of December, 19 72.

Alma F. Sexton

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CASE NO. 3684

NO. 3684
FILED: Jul 21 1972
[illegible]
Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,
Plaintiff,
-vs-
ROSALIE FISHER,
Defendant.

DECREE OF DIVORCE

THE ABOVE ENTITLED CAUSE having come on regularly for trial on the 21st day of July, 1972, before the Court sitting without a jury, the Plaintiff having appeared in person and through counsel, COHEN AND TERRY, Ltd., and the Defendant having appeared by and through counsel, T. DAVID HORTON, ESQ., and issue having been duly joined by the said attorney for the Defendant having interposed an Answer to the Complaint herein, and the Court having heard the evidence of witnesses submitted for decision and judgment, and the Court having been fully advised, finds:

That the Court has complete jurisdiction in the premises, both as to the subject matter thereof and as to the Parties hereto; that all of the allegations of the Plaintiff's Complaint are true; that the Plaintiff is now and for more than six weeks immediately preceding the commencement of this action has been an actual and bona fide resident of the County of Clark, State of Nevada, actually and physically residing therein during all of the said period of time; that the Plaintiff is entitled to an absolute Decree of Divorce on the grounds set forth in the Complaint, and

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
220 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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that the Defendant has expressly waived Findings of Fact, Conclusions of Law and Notice of Decision.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore and now existing between Plaintiff and Defendant be, and the same are hereby wholly dissolved, and an absolute Decree of Divorce is hereby granted to the Plaintiff, and each of the Parties hereto is hereby restored to the status of a single, unmarried person.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff execute a Deed to Defendant for the premises described as follows:

All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at a point on the southerly line of 158th Street, distant six hundred and ninety-four (694) feet two (2) inches westerly from the westerly line of Broadway, (formerly known as Boulevard) thence southerly parallel with Broadway (formerly known as Boulevard); and part of the distance through a party wall, one hundred (100) feet; thence Westerly, parallel with 158th Street, eighteen (18) feet eight (8) inches; thence northerly parallel with Broadway (formerly known as Boulevard) and part of the distance through a party wall one hundred (100) feet to the southerly line of 158th Street and thence easterly along the southerly line of 158th Street, eighteen (18) feet eight (8) inches to the point or place of BEGINNING, SAID PREMISES being known by the Street number 636 West 158th Street.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff pay to Defendant the sum of $2500.00 in full settlement of all

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ATTORNEYS AT LAW
228 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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claims of any kind or nature that Defendant has ever had against Plaintiff.

DATED AND DONE this 21st day of July, 1972, at Austin, Nevada.

John D. Sexton
DISTRICT JUDGE

COHEN AND TERRY, Ltd.

By _____
Attorneys for Plaintiff
229 North Third St.
Las Vegas, NV 89101

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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COHEN AND TERRY, LTD.
Attorneys at Law
229 NORTH THIRD STREET - LAS VEGAS, NEVADA 89101
Tel: (702) 384-6484

MEMORANDUM

TO Mrs. Emma Gandolfo
Lander County Clerk
County Courthouse
Austin, Nevada 89310

DATE July 28, 1972 RE: FISHER

Dear Emma:

The attorney in New York representing the wife has been very uncooperative about accepting the Deed and check.

Would you please mail these items by registered mail to KENNETH E. BRUCE, ESQ.
Theresa Towers
2090 Seventh Avenue
New York, NY 10027

I am enclosing a check in the amount of $5.00 for the mailing and your inconvenience. Would you please forward the Decree on to Judge Sexton for his signature.

We would appreciate it if this could be expedited as quickly as possible.

SIGNED

DATE

Would you then return then return the signed Decree to our office and we will forward a copy to David.

Thanks a lot.

Sincerely

SIGNED

FORM AVAILABLE FROM GRAYARC CO., INC.
882 THIRD AVE., B'KLYN, N.Y. 11232

KENNETH E. BRUCE, ESQ.
COUNSELLOR AT LAW
THERESA TOWERS
SUITE 104
2090 SEVENTH AVENUE
NEW YORK, N. Y. 10027

865-8910
AREA CODE 212

August 23rd, 1972

T. David Horton
Attorney at Law
P. O. Box 157
Battle Mountain, Nevada, 89820

Re: Fisher vs. Fisher

Dear Counsellor Horton:

I acknowledge receipt of your letter dated August 15th, 1972, I am enclosing a copy of the examination of title indicating the many liens that have been placed on the property making said property virtually valueless.

I have discussed the matter with Mrs. Fisher, who has retained you to prosecute the appeal as to doing whatever is required to correct what is tantamount to fraud.

The minutes of the trial which have been paid for will indicate that the plaintiff testified that the property was only encumbered by a first mortgage and no mention of liens in the amount of $15,015.00 for his bail jumping or $2,639.52 for a Federal Tax Lien.

I do consider this situation unconscionable, and trust that your office may be of assistance.

Yours very truly,

/Kenneth E. Bruce, Esq.,

KEB:bja
encl.

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P. S. Pursuant to our telephone discussion of this date, please find enclosed herewith my check in the amount of $1,000.00 for fee in connection with the appeal in the matter of Fisher vs. Fisher.

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Title No. AM-132 614 (36699CA)

THIS COMPANY CERTIFIES that a good and marketable title to the premises described in Schedule A, subject to the liens, incumbrances and other matters, if any, set forth in this certificate may be conveyed or mortgaged by:

GILBERT FISHER

Source of title by a certain deed dated 6/9/71 and recorded 6/14/71 in Reel 207 page 318.

Inspection discloses

Disposition

We set forth the additional matters which will appear in our policy as exceptions from coverage, unless disposed of to our satisfaction prior to the closing or delivery of the policy.

1. Taxes, tax liens, tax sales, water rates, sewer rents and assessments set forth herein.
2. Mortgages returned herewith and set forth herein. (ONE) INSERT NUMBER
3. Any state of facts which an accurate survey might show.
4. Survey exceptions set forth herein.
5. Affidavit of Title will be required on closing.

There are no restrictive covenants, conditions or easements of record unless set forth immediately following. C. & R's in Liber 7 Cp 304 Sec. 8.

6. Gilbert Fisher and Rosalie Fisher, his wife conveyed title to Gilbert Fisher in deed recorded June 14, 1971 in Reel 207 page 318. Proof is required that Rosalie Fisher is presently alive (that said deed was not given in anticipation of death).

7. The following Federal Tax Lien has been found open of record and must be cancelled:
U.S.A. against Ralph Fisher and Rosa Lee Fisher
c/o Stanley Aurotine - 19 Rector St., N.Y.C.
Amt: $2639.52 Filed: 9/17/71 - #4179

8. The following judgment has been found open of record and must be cancelled:
Public Service Mutual Insurance Co. Amt: $15,015.00
393 7th Avenue Dock: 11/13/70
vs. Perf: 11/13/70
Gilbert Fisher Ct: Sup. 18978/70
1886 - 7th Avenue, N.Y.C. Atty: David Flatow
393 7th Avenue, N.Y.

9. "Right to maintain vaults, if any in streets and charges therefor, if any".

NOTE: Mtg. in Liber 6359 Mp 121 for $14,500. held by Carver Federal.

Requirements set forth on the following page are a part of this certificate and must be complied with.

A duplicate copy of the exceptions is furnished you with the thought you may wish to transmit, with or without any of the other exceptions in the title report, to the attorney for the owner of the property and thereby facilitate the clearing of the objections prior to closing.

Commonwealth Abstract Company
2111 WHITE PLAINS ROAD
BRONX, NEW YORK 10462
Phone 931-0330
931-0331

DESCRIPTION OF PREMISES

ALL that certain lot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, County of New York, City and State of New York, bounded and described as follows:

BEGINNING at a point on the Southerly side of 158th Street, distant 694 feet 2 inches Westerly from the Westerly side of Broadway (formerly known as Boulevard); and

running thence Southerly parallel with Broadway and part of the distance through a Party Wall, 100 feet;

thence Westerly, parallel with 158th Street, 18 feet 8 inches;

thence Northerly, parallel with Broadway and part of the distance through a Party Wall, 100 feet to the Southerly side of 158th Street; and

thence Easterly along the Southerly side of 158th Street, 18 feet 8 inches to the point or place of BEGINNING.

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IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER Plaintiff vs ROSALIE FISHER Defendant	No. 3684 Filed August 24, 1972 Emma F. Gandolfo, Clerk By Laura D. Casady Deputy Clerk

NOTICE OF APPEAL

TO: GILBERT FISHER, PLAINTIFF AND TO COHEN & TERRY LTD. 229 NO. THIRD STREET, LAS VEGAS, NEVADA, HIS ATTORNEYS:

NOTICE IS HEREBY GIVEN that the Defendant above named, Rosalie Fisher, hereby appeals to the Supreme Court of the State of Nevada from the Decree of Divorce herein dated July 21, 1972, forwarded to the Clerk July 28, 1972 to be forwarded to the Judge for signature. This appeal is taken as to both law and fact and to the whole thereof.

DATED this 24th day of August, 1972.

T. David Horton

T. David Horton
P. O. Box 157
Battle Mountain, Nevada 89820
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed postage prepaid, this 24th day of August, 1972, to Cohen & Terry, Ltd, 229 North Third Street, Las Vegas, Nevada, attorneys for Plaintiff.

T. David Horton

T. David Horton

$250.00 accepted in lieu of appeal bond.

Laura D. Casady

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSALIE FISHER,

Appellant,

vs.

GILBERT FISHER,

Respondent.

No. 7299

FILED

JUL 13 1973

C. R. DAVENPORT

DEPUTY CLERK

ORDER DENYING MOTION TO SUPPLEMENT RECORD AND DISMISSING APPEAL

Appellant has moved to supplement the record on appeal with documents that originated after the entry of judgment. The inclusion of such new matter is impermissible and the motion is denied. United States v. McLean, 78 Nev. 60, 368 P. 2d 872 (1962).

Upon further consideration of the matter, it appears that the relief sought by appellant is available in the district court under NRCP 60(b); therefore, the appeal is dismissed, without prejudice.

It is so ORDERED.

Thompson, C. J.

Zenoff, J.

Gunderson, J.

cc: Hon. John F. Sexton, District Judge
T. David Horton, Esq.
Messrs. Cohen & Terry
Emma F. Gandolfo, County Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,	)	NO. 3684
Plaintiff,	)	Filed: [illegible]
-vs-	)	[illegible] CLERK
ROSALIE FISHER,	)	By: _____ Deputy
Defendant.	)	
_____	)	

MOTION FOR RELIEF FROM JUDGMENT

COMES NOW, Defendant above named, by and through her Attorney, T. DAVID HORTON and moves the Court for relief from judgment herein pursuant to Rule 60(b) of the Nevada Rules of Civil Procedure and as grounds therefor shows the Court as follows:

I

The judgment is void in that the District Court was without jurisdiction to enter a Decree of Divorce. N.R.S. Section 125.020 provide in pertinent part as follows:

> 2. Unless the cause of action shall have accrued within the county while plaintiff and defendant were actually domiciled therein, no court shall have jurisdiction to grant divorce unless either the plaintiff or defendant shall have been a resident for a period of not less than six weeks preceding the commencement of the action.

The jurisdiction of the District Court is based squarely upon Plaintiff's residence. There is a further requirement set forth in N.R.S. 54.010 regarding testimony as to this jurisdictional prerequisite.

> 54.010 Requirement in Civil Cases. In all civil cases where the jurisdiction of the court depends upon the residence of one of the parties to the action, the court shall require corroboration of the evidence.

With the exception to two conflicting statements as to Plaintiff's

DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

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actual residence (Record at 28, line 21; Record at 46, lines 28-30) the Transcript is devoid of any Testimony corroborating the requirements of N.R.S. 125.020.

II

Plaintiff's failure to comply with the terms of the Stipulation entered into on July 21st, 1972, amounts to a fraud on the Court or a material misrepresentation of an adverse party. The Stipulation required Plaintiff to pay to Defendant the sum of TWENTY-FIVE HUNDRED DOLLARS ($2500.00) and convey the Deed to certain real property in New York City. The Record at page 64, lines 4 through 20 discloses the terms of that Stipulation:

> MR. HORTON: Do we have a stipulation that she gets the house, $2,500.00 and no alimony?
>
> MR. THOMAS (New York counsel for Plaintiff): Right. The decree won't be entered until we have the deed and the money.
>
> THE COURT: As soon as you notify me, I will sign the decree.
>
> MR. THOMAS: We will do it now.
>
> MR. BRUCE (New York counsel for Defendant): That's all right. Let's do it now.
>
> THE COURT: Why don't we follow the original suggestion. When Mr. Bruce gets the money and the deed we will sign the decree.
>
> MR. THOMAS: If Mr. Bruce will notify him in twenty-four hours.
>
> MR. BRUCE: I will stipulate that you will be notified within twenty-four hours and the deed has been signed. We want to run a title search.
>
> THE COURT: All right. (underscoring added)

Counsel for Defendant desired a title search to insure against undisclosed encumbrances making the property valueless. The Court agreed with this suggestion. Before a title search could be completed, Plaintiff's counsel submitted a Decree of Divorce for signature and filing. The subsequent title search revealed the property to be encumbered to the extent as to make it almost

DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

valueless.

The agreement to convey free of all but the Seven Thousand Dollar ($7,000.00) mortgage disclosed by Plaintiff was an integral part of the Stipulation as was the agreement to allow title search before submitting the Decree to the Judge. Without fulfilling his part of the Stipulation, Plaintiff should be foreclosed from obtaining any benefit thereunder.

WHEREFORE, Defendant asks that a date be set for the hearing of the within Motion; that she be relieved from the Decree of Divorce filed herein and that she be awarded Attorney's fees and her costs in this action.

Respectfully submitted,

T. David Horton

T. DAVID HORTON
P.O. Box 157
Battle Mountain, Nevada 89820
Attorney for Defendant

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

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IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,) NO. 3684

Plaintiff,) Filed: Jul 23 - 1973

-vs-) CLERK

ROSALIE FISHER,) By: _____ Deputy

Defendant.)

_____)

POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

I

The corroborated testimony of a party to a divorce action concerning his residence is insufficient to confer jurisdiction upon the District Court.

N.R.S. Section 54.010

O'Keefe v. O'Keefe, 209 Ark. 837, 192 SW 2d 556

Wells v. Wells, (Texas) 177 SW 2d 348

Slade v. Slade, (N.D.) 122 NW 2d 160

Hemphill v. Hemphill, 84 Ariz. 95, 324 P.2d 225

The provisions of Nevada Revised Statute 54.010 are mandatory and may not be waived.

Davidson v. Davidson, 120 Ind. App. 253, 90 NE 2d 821, rehearing denied 120 Ind. App. 91 NE 2d 796

Coulter v. Coulter, 103 Ind. App. 565, 9 NE 2d 141

Driver v. Driver, 152 Ind. 88

Prettyman v. Prettyman, 125 Ind. 149, 25 NE 179

II

A stipulation will not be enforced in favor of one who has failed to comply with the conditions under which it was made.

Board of Insurance Commissioners v. Highway Insurance Underwriters, (Texas) 169 SW 2d 541

DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

108 93

State Highway Commission v. Kinman, 150 Mont. 12, 430 P. 2d 110

A party to a stipulation will not be permitted thereunder to take the other party by surprise and defeat the ends of justice.

Gottwals v. Rencher, 60 Nev. 35, 92 P.2d 1000

O'Neale v. Cleveland, 3 Nev. 485, 497

Walsh v. Wallace, 26 Nev. 299, 67 P. 914

Respectfully submitted,

T. DAVID HORTON
P.O. Box 157
Battle Mountain, Nevada 89820
ATTORNEY FOR DEFENDANT

T. DAVID HORTON
ATTORNEY AT LAW
BATTLE MOUNTAIN,
NEVADA 89820

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Case No. 3684

3684
Aug 15 1973
Emma F. Fisher

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER, Plaintiff, vs. ROSALIE FISHER, Defendant.	PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

COMES NOW Plaintiff above named by and through his Attorneys, COHEN AND TERRY, Ltd., and states as follows:

I.

Defendant asserts that the District Court was without jurisdiction to enter a Decree of Divorce, and further asserts that said lack of jurisdiction is based upon noncorroboration of the Plaintiff's residence. Plaintiff asserts that his residence was corroborated by both the Answers to Plaintiff's Interrogatories to Plaintiff's resident witness, LINDA WEBER, filed July 18, 1972, and also the Answers to Defendant's Interrogatories signed by LINDA WEBER, filed on July 18, 1972, both asserting that the resident witness had in fact seen the Plaintiff in Las Vegas, Nevada, every day during the six weeks preceding the filing of the Plaintiff's Complaint for Divorce and on occasions thereafter. Further, the Defendant did not raise any objection at the time of trial. Plaintiff therefore relies upon

> Grant v. Grant, 38 Nev. 185, 147. P. 451 (1915), at p. 188, "While the general rule is that jurisdiction over the subject matter cannot be conferred on a

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
228 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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Court by consent, it has been held that want of that jurisdiction over the person may be waived."

Boisen v. Boisen, 85 Nev. 122, 451. P. 2d 363 (p. 124), "While the husband was permitted to plead in the alternative, NRCP 8, his assertion of jurisdiction by the counterclaim coupled with his complete acquiescence in the wife's claim to jurisdiction at trial estopped him from raising the issue for the first time on appeal. Grant v. Grant, 38 Nev. 185, 147 P. 451 (1915)

Accordingly we hold that the district court's finding was supported by substantial evidence (residence) and that in any event the husband was estopped from raising the issue for the first time on appeal."

WHEREFORE, Defendant should not be allowed to raise an issue which was fully before the Court but not accepted to by the Defendant at that time.

II.

Defendant asserts that Plaintiff failed to comply with the terms of the Stipulation entered into on July 21, 1972, in that Defendant asserts that property which was conveyed by Plaintiff to Defendant has encumbrances which Defendant was not aware of at the time of the Stipulation. However, the Defendant has now had the Plaintiff's $2,500.00 for the past year, which has never been returned to the Plaintiff. Defendant, further, has retained the Deed conveying the subject premises. Plaintiff further asserts that the only encumbrances which Defendant complains of are (1) a judgment in the amount of $15,015.00, which Plaintiff was unaware of at the time of the Stipulation, but which has been satisfied, copy of said Certificate of Disposition of Judgment being attached hereto as Exhibit No. 1 for the Plaintiff; and (2) further, the assertion made by the Defendant that the premises were subject to IRS lien is a spurious claim in that the IRS lien asserts that the Parties, being RALPH FISHER and ROSA LEE FISHER, neither of said Parties being either the Plaintiff or Defendant; that the Plaintiff has never been known by any other name other than GILBERT FISHER, and that Plaintiff has attached hereto a copy of the Plaintiff's Birth Certificate as Exhibit No. 2.

OHEN & TERRY, LTD.
ATTORNEYS AT LAW
128 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

That in no way has the Defendant been damaged as a result of the granting of the Decree of Divorce.

WHEREFORE, Defendant's Motion to Set Aside the Decree of Divorce should be denied.

DATED this 14th day of August, 1973.

COHEN AND TERRY, Ltd.

By _____
Attorneys for Plaintiff
229 North Third Street
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT was mailed, postage prepaid, this 14th day of August, 1973, to T. DAVID HORTON, Attorney for Defendant, at P. O. Box 157, Battle Mountain, Nevada 89820.

_____
TONY G. TERRY

COHEN & TERRY, Ltd.
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

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EXHIBIT NO. 1

829

No. 5893

CERTIFICATE OF DISPOSITION OF JUDGM

JUDGMENT DEBTOR				JUDGMENT CR
Surname	Given Name	Trade or Profession	Last Known Address	Name and Addr
Fisher	Gilbert		1886 - 7 ave my my	Public Servic Insurance 393 - 7 av my

JUDGMENT DOCKETED	JUDGMENT RENDERED	AMOUNT OF JUDGMENT
Date 1970 Nov 13	Court Supreme	Damages
	County my	Costs ∅
	Index No. 18978-70	Total 15015.00
Hr. & Min. 12:15	Date 11-13-70	
	Hr. & Min. 12:15	

EXECUTION	SATISFIED	
When Issued	When	How and to What Extent
	1972 Sept 25	Fully Satisfied By Satisfaction Piece
When Returned Unsatisfied		

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, NORMAN GOODMAN, Clerk of the
correct transcript from the Docket of Judgments in my office.
And I further certify that the above Judgment is Satisf

IN TESTIMONY WHEREOF, I have hereunto set my name and affix

ENT

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EDITOR ess	ATTORNEY FOR JUDGMENT CREDITOR Name and Address
Mutual	David
Co.	Flatow
e	393-7 ave
y	ny ny

	REMARKS: DATE AND MANNER OF CHANGE OF STATUS OF JUDGMENT

County of New York, hereby certify that the above is a

ied of Record

d my official seal this 25 day of Sept 1972

Norman Goodman

COUNTY CLERK, NEW YORK COUNTY

COHEN & TERRY, LTD
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

Bureau of Vital Records Department of Health The City

CERTIFICATION OF BIRTH

THIS IS TO CERTIFY *that* Gilbert Fisher

Sex Male *was born in the City of New York on* February 4, 1918

according to Birth Record No. 6948 *filed in the Manhattan*

Office of this Bureau on Feb. 4, 1918

In witness whereof, the seal of t
of Health of the City of New York ha
hereto this 25 *day of* January

City Registra
Borough

M 79945

Warning: This certification is not valid if it does
seal of the Department of Health. Th
alteration of this certification is prohib
of the New York City Health Code.

84H-76M 706199(71)

EXHIBIT NO. 2

104 109

830

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1973

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Registrar

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NO. 3684

FILED: Dec. 13, 1973

EMMA F. GANDOLFO

By Karen C. Wade Clerk
Deputy

Case No. 3684

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,

Plaintiff,

vs.

ROSALIE FISHER,

Defendant.

E X H I B I T

1. Copy of letter dated November 5, 1973 from ISAAC G. McNATT, Attorney at Law, attached hereto.

2. Copy of letter dated November 2, 1973 addressed to ISAAC G. McNATT, ESQ., from DAVID E. FLATOW of PUBLIC SERVICE MUTUAL INSURANCE COMPANY, attached hereto.

COHEN AND TERRY, Ltd.

By _____
Attorneys for Plaintiff
229 North Third Street
Las Vegas, Nevada 89101

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
229 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

107-110

ISAAC G. McNATT
ATTORNEY AT LAW
848 ST. NICHOLAS AVENUE
NEAR 152ND STREET
NEW YORK, N. Y. 10031
212 AUDUBON 3-2400

November 5, 1973

Cohen & Terry, Ltd.
229 North Third Street
Las Vegas, Nevada 89101

Re: Gilbert Fisher

Gentlemen:

In further reference to the above, I enclose copy of letter received from Public Service Mutual Insurance Company. This might prove helpful in the issue as to whether my client had notice of the filing of a judgment against him.

Very truly yours,

Isaac G. McNatt

IGM:lm
Encl.

408-1

PUBLIC SERVICE MUTUAL INSURANCE COMPANY

NATIONAL AGENCY MANAGERS INC.
11 Grace Avenue
Great Neck, New York 11021
(516) 487 6602

November 2, 1973

Isaac G. McNatt, Esq.
848 St. Nicholas Avenue
New York, New York

Dear Sir:

In reply to your recent request for information regarding the filing of Confessions of Judgment, please be advised our procedure is as follows:

> On bonds in the amount of $5,000.00 and over it is normal procedure to file a Judgment in order to secure the bond until the case is disposed of. Upon termination of the case a Satisfaction is filed with the respective Court and the case is closed.

If there is any further information you require, please do not hesitate to contact us.

Very truly yours,

NATIONAL AGENCY MANAGERS INC.

David E. Flatow

DEF:avm

833

SURETY OUR SPECIALTY

109112

COHEN & TERRY, LTD.
ATTORNEYS AT LAW
228 NORTH THIRD STREET
LAS VEGAS, NEVADA
TELEPHONE 384-6484

118

I hereby certify that on November 14, 1973, I served the foregoing Exhibits by deposition a copy of the same in the U. S. Mails in Las Vegas, Nevada, postage prepaid and addressed to:

T. David Horton,
Attorney for Defendant
P. O. Box 157
Battle Mountain, Nevada 89820

Dated: November 14, 1973.

TONY G. TERRY

CASE NO. 3684

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER,)

Plaintiff,)

vs.)

ROSALIE FISHER,)

Defendant.)

O R D E R

IT IS HEREBY ORDERED that Defendant's motion to set aside the decree of divorce entered on the 21st day of July, 1972, in the above entitled matter, be and is hereby denied.

DATED this 4th day of April, 1974.

DISTRICT JUDGE

103

GILBERT FISHER,	)	NO. 3684
Plaintiff,	)	Filed: MAY 3 1974
-vs-	)	CLERK
ROSALIE FISHER,	)	By: Deputy
Defendant.	)	

NOTICE OF APPEAL

TO: GILBERT FISHER and TONY G. TERRY, COHEN AND TERRY LIMITED, 229 N. THIRD STREET, LAS VEGAS, NEVADA, ATTORNEY FOR PLAINTIFF.

NOTICE IS HEREBY GIVEN that the Defendant ROSALIE FISHER hereby appeals to the Supreme Court of the State of Nevada from the Order Denying Motion to Set Aside Decree of Divorce entered herein on or about the 5th day of April, 1974. This Appeal is taken as to both law and fact and to the whole thereof.

DATED this 3rd day of May, 1974.

T. DAVID HORTON
P.O. Box 157
Battle Mountain, Nevada
89820
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF APPEAL was mailed, postage prepaid, this 3rd day of May, 1974, to COHEN AND TERRY LIMITED, 229 NORTH THIRD STREET, LAS VEGAS, NEVADA.

T. DAVID HORTON

104

GILBERT FISHER,)

Plaintiff,)

-vs-)

SALIE FISHER,)

Defendant.)

NO. 3684

FILED: [illegible]

EMMA F. GANDOLFO CLERK

BY: [illegible] DEPUTY

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

1. Complaint filed April 11, 1972.

2. Letter from Emma F. Gandolfo to Kenneth E. Bruce, Esq. dated May 5, 1972.

3. Answer and Counterclaim filed June 9, 1972.

4. Motion to Set Aside Default and Default Judgment filed June 9, 1972.

5. Affidavit in Support of Motion to Set Aside Default and Default Judgment filed June 9, 1972.

6. Notice of Hearing filed June 9, 1972.

7. Stipulation and Order filed July 14, 1972.

8. Reply to Counterclaim signed July 14, 1972 by Gilbert Fisher.

9. Transcript of Proceedings of July 21, 1972, dated Decembe4 8, 1972.

10. Any and all Exhibits or Evidence introduced at Hearing on July 21, 1972.

11. Letter dated July 28, 1972 from counsel for Plaintiff to Clerk.

12. Letter dated August 3, 1972 from Kenneth E. Bruce, Esq. to Honorable John F. Sexton.

13. Decree of Divorce dated July 21, 1972.

14. Notice of Appeal filed August 24, 1972.

15. Order Denying Motion to Supplement Record and Dismissing Appeal filed July 13, 1973.

16. Motion for Relief from Judgment, filed July 23, 1973.

17. Points and Authorities in Support of Defendant's Motion for Relief from Judgment filed July 23, 1973.

1-15-

Judgment filed August 15, 1973.

20. Order denying Defendant's Motion to Set Aside the Decree of Divorce, dated April 4, 1974.

21. Notice of Appeal dated May 3, 1974.

22. This Designation of Record.

T. David Horton

T. DAVID HORTON
P.O. Box 157
Battle Mountain, Nevada 89820
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANT'S DESIGNATION OF RECORD ON APPEAL was mailed, postage prepaid, this 24th day of May, 1974, to COHEN & TERRY, LTD., Attorneys at Law, 229 North Third Street, Las Vegas, Nevada 89101.

T. David Horton

T. DAVID HORTON

-10-

GILBERT FISHER,

Plaintiff,

-vs-

ROSALIE FISHER,

Defendant.

NO. 3684

Filed: MAY 24, 1974

EMMA F. GANDOLFO CLERK

By: [illegible] Deputy

POINTS TO BE URGED ON APPEAL

1. The District Court erred in not requiring corroboration of Plaintiff's residence.

2. The District Court erred in granting Plaintiff a Decree of Divorce prior to the fulfullment of the terms of the stipulation.

3. The District Court erred in failing to set aside the original Decree of Divorce herein.

DATED THIS 24th day of May, 1974

T. DAVID HORTON
P.O. Box 157
Battle Mountain, Nevada 89820
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing POINTS TO BE URGED ON APPEAL and a copy of APPELLANT'S DESIGNATION OF RECORD ON APPEAL, was mailed, postage prepaid, this 24th day of May, 1974, to COHEN AND TERRY, LTD., 2229 North Third Street, Las Vegas, Nevada 89101, Attorneys for Plaintiff.

T. DAVID HORTON

107

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

GILBERT FISHER, Plaintiff, vs. ROSALIE FISHER, Defendant.	RESPONDENT'S DESIGNATION OF RECORD ON APPEAL

1. All exhibits filed by Plaintiff in response to Defendants' Motion to Set Aside the Decree of Divorce dated April 4, 1974, including but not limited to the letter dated November 5, 1973 from ISAAC G. McNATT, Attorney, and the letter dated November 2, 1973 from DAVID E. FLATOW of PUBLIC SERVICE MUTUAL INSURANCE COMPANY.

2. Plaintiff's Interrogatories to LINDA WEBBER filed June 23, 1972.

3. LINDA WEBBER's Answers to Plaintiff's Interrogatories signed July 17, 1972.

4. Defendant's Interrogatories to LINDA WEBBER.

5. LINDA WEBBER's Answers to Defendant's Interrogatories, filed July 18, 1972.

CERTIFICATION OF MAILING

I hereby certify that service of the foregoing Respondent's Designation of Record on Appeal was made this [illegible] U.S. Mail's in [illegible]

[illegible] T. David Horton
P. O. Box 157
Battle Mountain, Nev. 89820
Attorney for Defendant
Dated this [illegible] day of June [illegible] 74.

COHEN AND TERRY, Ltd.

By [signature]
Attorneys for Plaintiff
229 North Third Street
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

This is to certify that on this ~~12th~~ 17th day of February, 1975, I served one copy of the within APPENDIX TO BRIEF OF APPELLANT upon the following person by hand delivering a true copy of same to him or his clerk.

Kenneth Feinberg, Esq.
Asst. United States Attorney
United States Courthouse
Foley Square
New York, N.Y. 10007

Fred Wallace
Attorney for Appellant